Supreme Court, U.S.
FILED
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No.

In The
**SUPREME COURT OF THE UNITED STATES**

OSCAR PORCELLI
*Petitioner,*
v.
UNITED STATES OF AMERICA,
*Respondent*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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# QUESTIONS PRESENTED

1. Whether the mail fraud statute (18 U.S.C. §1341), which makes it a crime to scheme to defraud a victim of money or property, applies to the underreporting of New York State sales taxes, when the State of New York – the "victim" – did not criminalize sales tax evasion at the time, but rather applied civil penalties only, and where New York's highest court has held that a failure to pay taxes due to the State does not constitute larceny, because New York State is not the owner of unpaid taxes.

2. Whether a Writ of *Coram Nobis* is properly issued where a defendant's felony conviction, *inter alia*, disqualifies him to sit as a juror under state law, and in any event because the conviction is for conduct that is not and was not criminal.

## PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were: Prosecutor, United States of America, and Defendant-Petitioner OSCAR PORCELLI.

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In The
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October Term, 2002

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No.

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OSCAR PORCELLI

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UNITED STATES OF AMERICA,

Respondent

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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## OPINION BELOW

The Court of Appeals' opinion affirming the denial of coram nobis relief is reprinted in App. A.1-12 It is also published at 303 F.3d 452 (2d Cir. 2002). The district court's unpublished opinion denying relief (2001 U.S. Dist. LEXIS 24649) is reprinted at A 13-25. The Court of Appeals' decision affirming OSCAR PORCELLI's conviction, which is the subject of the *coram nobis* petition, is published at 865 F.2d 1352 (2d Cir. 1989), and reprinted at A . 29 *et seq.*

## JURISDICTION

The Order affirming the denial of relief was entered on September 13, 2002. Jurisdiction is invoked under 28 USC §§1254(1) and 2101(c)).

## RELEVANT DECISION

The opinion of the New York Court of Appeals on which the *coram nobis* petition was based, People v. Nappo, 94 N.Y. 2d 564, 708 N.Y.S.2d 41 (2000), is reprinted at A. 25.

## STATEMENT OF THE CASE

In 1989, a sharply-divided panel of the Second Circuit affirmed Petitioner Oscar Porcelli's convictions for mail fraud and RICO, United States v. Porcelli, 865 F.2d 1352 (2d Cir.), cert. denied, 110 S.Ct. 53 (1989), premised exclusively on his role in filing fraudulent New York State sales tax returns for gas stations owned by his corporations, by which he withheld sales taxes from the State. Against Mr. Porcelli's arguments that (a) the withholding of sales taxes did not amount to mail fraud under the then-newly-decided McNally case, McNally v. United States, 483 U.S. 350, 107 S. Ct. 2875 (1987), in which this Court drastically (but properly) limited the reach of the federal mail fraud statute to "property rights" of a government-victim, and (b) in that the State of New York (the

"victim") did not *itself* criminalize the underpayment of sales taxes, and had held that the filing of false sales tax returns did not constitute larceny under New York law, People v. Valenza, 60 N.Y.2d 363, 469 N.Y.S.2d 642 (1983) the Second Circuit majority upheld the convictions, though it first stated that "the prosecution of a state sales tax evader for a RICO violation pushes that law to its outer limits, especially when that tax evasion was not made criminal by the state itself at the time that the fraudulent returns were filed."

Despite the applicability of the rule of lenity in such circumstance and the Due Process consideration when a citizen is criminal prosecuted for a "crime" against the State that the State did not even call a crime, the majority "nevertheless affirm[ed] the convictions (except for six counts involving only the mailing of blank forms by the State to Porcelli's companies)", but stated that it was affirming only "by virtue of the extraordinarily broad sweep of RICO and of the federal mail fraud statute and despite McNally ...." 865 F. 2d at 1355 (A.31).

The majority, purporting to interpret New York State law, held that tax obligations are "unique" under New York Law, and that, because of this "unique" nature of tax obligations, the State's *claim* to taxes constituted a "chose in action" and that Mr. Porcelli had deprived New York of that

property, and so violated the mail fraud statute.

Judge Newman dissented, stating that tax obligations were no different from ordinary debts. Since, under McNally, the mail fraud statute protects only the deprivation of property, as the common law uses that term, and since a debtor does not deprive his creditor of any property that can be called the creditor's by failing to pay the debt (the State still retains the "claim" -- which is the "chose in action" to which the majority referred), Judge Newman argued that Mr. Porcelli's failure to pay sales taxes did not deprive the State of its property and, therefore, the non-payment was not "mail fraud."

Petitioner lost one attempt to gain *habeas corpus* ("2255") relief in 1990, when he brought to the Court's attention the decision of the New York Court of Appeals in State of New York v. Barclays Bank of N.A., 76 N.Y.2d 553, 561 N.Y.S.2d 697 (1990). In Barclays, a suit was brought by New York tax authorities in an effort to obtain from Barclays Bank monies that had been destined to pay the State for tax obligations, but were diverted through forged endorsements honored by the bank. The State argued not only that it had a right to collect from the bank under the U.C.C., but that it had a right to the funds under equitable, restitutionary principles -- principles which, we then argued, surely would have been upheld if the New York Court of Appeals believed that New

York had "special" property interests in tax obligations.

However, in Barclays, the New York Court of Appeals denied recovery to the State. While the bulk of the decision centered on the U.C.C. issues, the Court also denied recovery under restitutionary principles, holding that the State had no property interest such that it could get restitution, because it did not have possession of tax dollars in the first place. The district court denied the 2255 petition, "distinguishing" Barclays. The Second Circuit affirmed the denial. Porcelli v. United States, 964 F.2d 1306 (2d Cir. 1992).

**The Basis Of The Subject *Coram Nobis* Petition**

In 2000, the New York Court of Appeals decided People v. Nappo, supra, 94 N.Y.2d 564 (2000) (reprinted in the Appendix at A.24). The Court there reversed larceny and conspiracy convictions of motor fuel importers because, the Court held, the State was not the owner of taxes *required* to be paid (in Nappo for the importation of motor fuel) but unpaid.

Nappo and others had been indicted for "stealing" tax dollars in connection with their importation of motor fuel from New Jersey to New York without filing reports "or paying 'motor fuel taxes' as required by the New York Tax Law". The State argued that defendants were "required" to pay the taxes, and that the taxes due were the property of the State – the very proposition accepted by the Second Circuit majority

in affirming Mr. Porcelli's convictions "by virtue of the extraordinarily broad sweep of RICO and of the federal mail fraud statute and despite McNally".

The New York Court of Appeals flatly rejected the State's claim: It held that New York State "is not an owner ... of taxes required to be paid .... The taxes due were not the property of the State prior to their remittance." "Accordingly", the Court ruled, the defendants "did not steal money that belonged to the State, but rather failed to make payments of taxes which were their personal obligations under the Tax Law". The Nappo Court noted that a statute post-dating Mr. Porcelli's conduct – New York Tax Law §1817(k) – now "specifically authorizes prosecution under the Penal Law for failure to remit to the State sales taxes that have previously been collected from consumers". But that statute was not in effect at the time of Mr. Porcelli's conviction, and was not the basis for the conviction. Moreover, Mr. Porcelli had not *collected* the taxes (as this Court discussed in its affirmance and dissent).

The Nappo Court also flatly rejected the People's position that failure to pay taxes due in Nappo's case – taxes due on importation of fuel – "is equivalent to the failure to remit collected sales taxes", which, by statute enacted after the Porcelli conduct, made the withholding of sales taxes a crime.

At the time of Mr. Porcelli's offense, sales tax withholding was only a civil violation in New York State; with the passage of the new statute, the New York legislature determined that a "seller who collects sales taxes holds money in trust for the State". Id., citing Tax Law § 1817(k). Thus, said the Court, because of the State statute – which had not been enacted when Mr. Porcelli's conduct occurred -- the State "may be deemed the `owner' of `collected' but unremitted sales taxes". (In Mr. Porcelli's case, the Court also agreed that the government had not shown that Mr. Porcelli had "collected" sales taxes; the case concerned only the obligation to pay).

The New York Court of Appeals, addressing the State's interests in unpaid taxes in Nappo, did not hold (as did the 1989-Porcelli I majority purporting to interpret New York law in affirming Mr. Porcelli's conviction) that tax obligations are "unique" and hence not paying them constitutes theft of a "chose in action". If that were the case then Nappo would have been criminally responsible under the larceny statutes.

Shortly after Nappo was reported, Mr. Porcelli moved for habeas relief or for *coram nobis* relief (since Mr. Porcelli completed his sentence).

**The Denial Of Coram Nobis Relief**

The district court noted that the government did not dispute that Mr. Porcelli had met "the first two prongs of the

test" governing the propriety of *coram nobis* – that there were "compelling circumstances" in this case, and that Mr. Porcelli had not delayed. However, the Court accepted the government's view that, as compelling as the circumstances are in this unique case, Mr. Porcelli did not meet the third prong – that there were "continuing legal consequences" sufficient to warrant relief.

The district court dismissed the fact that Mr. Porcelli was barred from working for his company, Gaseteria Oil Corp., as a continuing disability arising from his conviction; as to the fact that Mr. Porcelli's conviction had stood in the way of getting a liquor license, or obtaining financing, or going public, the district court cited Fleming v. United States, 146 F.3d 88 (2d Cir. 1998) (per curiam), and ruled it "purely speculative" that Mr. Porcelli could not take his company public or obtain a liquor license (A.18). The district court pointed to an affidavit of the C.E.O. of Gaseteria, in which the officer reported that Mr. Porcelli's conviction had prohibited financing for the company, but curiously stated that this did not constitute evidence of a continuing disability because there was no evidence that Gaseteria "could obtain such [financing] ...." (A18-19 ). (The *per curiam* opinion in Fleming had noted the absence in that record of evidence that the petitioner had ever *sought* financial employment of the type he claimed (for the

first time on appeal) that he was "disabled" from achieving "or that he could obtain such employment but for his conviction" - unlike the affidavit in this case, which demonstrated that Mr. Porcelli had tried and that he had been denied financing without considering other factors.)

As to the fact that Mr. Porcelli had given the U.S. Government $500,000 by way of a fine to resolve the remanded criminal forfeiture issues, Judge Sifton tersely held that the payment was in the "past" and so "does not present a `continuing collateral consequence' of Porcelli's conviction" (A.19 ). Finally, the district court held that, though the disability under State law, New York Judiciary Law § 510, which prohibits an individual with a felony conviction from sitting as a juror, is "an undeniable continuing consequence of his conviction", it was "unclear ... whether such a continuing consequence is sufficient to allow this Court to consider petitioner's coram nobis claims" (App. 73). Justifying his "unclarity" on the supposedly "casual way in which the right to serve on a jury was invoked at oral argument" (App.74)(we presented it in a submission *solicited* by the court at oral argument, Judge Sifton mused that it was "not at all clear that petitioner [actually] has such a right" to sit on a jury because he had shown "no evidence" that he had "ever been randomly selected for jury service". We supplemented the record before

argument to the Second Circuit showing that in fact Mr. Porcelli had recently been summoned to sit as a juror and had been told he was disqualified. But, to the district court, the right to sit as a juror "seems at least as speculative as his right to obtain a liquor license" and so did not create an "adequate" basis on which to *review* the matter for coram nobis relief (A.20-21). The court rendered this holding despite this Court's identification of the right to sit as a juror as an important collateral consequence of a conviction, in Carafas v. LaVallee, 391 U.S. 234, 88 S.Ct. 1556 (1968) – a right that only gained in importance after this Court decided Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986), holding that the right to sit as a juror belongs to the juror.

Though dismissing the showing of adequate continuing disabilities, which the district court believed were necessary before it could *consider* the merits of a *coram nobis* petition, the court "in any event" jumped to the merits and "distinguished" the Nappo case (adopting the government's strained distinctions). Quoting the 1989 majority opinion in affirming Mr. Porcelli's conviction, the district court said that the New York Court of Appeals' Nappo decision "has no effect on th[e Second Circuit's] reasoning" (A.22). That is because -- according to the district court -- the Second Circuit, in affirming, held that the tax obligations of which Mr. Porcelli

supposedly deprived the State of New York were "choses in action", but Nappo did not deal with that theory – i.e., did not mention choses in action – so the cases were (supposedly) totally different. The district court did not answer Petitioner's inquiry as to how the Nappo Court could have dismissed the larceny count when the same type of "chose in action" was involved -- the supposedly "unique" nature of a tax obligation under New York law.

The district court also distinguished Nappo on the basis that Nappo dealt with the "statutory obligation of a business entity to pay its own taxes". In Mr. Porcelli's case, according to the district court, the court dealt with the "obligation of a vendor to *collect* [emphasis added] taxes from its customers `as trustee for and on account of the state'" – and the court stated that it was this this obligation that was "at issue" in Mr. Porcelli's case (A ) but not in Nappo.

**The Second Circuit's Affirmance Of Denial Of *Coram Nobis* Relief**

The Court of Appeals did not deal with the "continuing disability" issue, except to say that it was an "alternative[]" ruling (A.7). (At oral argument, it expressed concern that the showing of disablement to sit as a juror might make every conviction non-final. However, we argued that the other two "prongs" of *coram nobis* must be satisfied before relief will be

appropriate - especially the "prong" requiring "compelling circumstances").

Instead, the Court ruled that there was no reason, in the Nappo decision or anything else, to "alter our conclusion" concerning the applicability of the mail fraud statute to the conduct at issue, and further stated that Petitioner had "misunderst[oo]d[] and distort[ed]" this Court's decision in McNally v. United States, supra.

Mischaracterizing Petitioner's argument as one addressed to whether there was a "vested right" – a word not used in the *coram nobis* petition or in the Second Circuit briefs – the Court said that Nappo was "not inconsistent" with the Porcelli I ruling; continuing, it said that in Nappo the State "did not argue, and the Court did not address, whether a chose in action representing a claim for unpaid taxes is property of the State." 303 F.3d at 456-57.

"That would in any event have been irrelevant", the Court of Appeals continued, "because there had been no taking obtaining or withholding of the chose in action. What the defendants had done [in Nappo] was rather to conceal its existence, by not reporting their importation of fuel. They had committed a fraud, but not a larceny, and larceny was the crime charged". 303 F.3d at 457.

The Court then (mis)characterized the nature of the

original charges against Mr. Porcelli: "The defendant here was not charged with theft of the State's property [emphasis added]. He was charged with underreporting a sales tax obligation so as to reduce his payment of sales taxes." Then, in words that, if left to stand, will turn the mail fraud statute back on its head and totally contravene the State of New York's definition of the property interests involved in tax claims, the Court said: "The fact that the State was not the proprietor of the money the defendant was obligated to pay in taxes, and that the defendant did not larcenously take State money does not contradict that he used fraud to conceal from the State its claim for sales taxes and thus *effectively* [emphasis added] deprived the State of its property right in its chose in action". 303 F.3d at 457.

The Court of Appeals' assertion that the highest Court of the State of New York had not "considered" in the Nappo case whether the intangible "chose in action" - the claim to taxes or the interest in unpaid taxes - was the State's property, is belied not only by the language and import of the decision itself. It is confirmed by the notation of the parties' arguments, which are noted in the official New York Court of Appeals decisions, and which indeed, have been used to preclude further litigation of issues identified in those notations. Thus, when reporting the State's argument, the Reporter reads:

"Defendant's concealment of tax liability and wrongful withholding of the taxes due the State of New York established larceny in the first degree and thus supported the charge of conspiracy."

No matter which way it is "sliced", the New York Court of Appeals' decision in Nappo plainly shows that it rejected the notion that concealing a tax liability, or not paying taxes due, constitute a taking of "property" belonging to the State. The Porcelli I affirmance is inconsistent with Nappo.

Based on its rejection of the authority of Nappo, the Court of Appeals then held that Petitioner had "mistakenly read" McNally as "narrowing the meaning of fraud, as embodied in §1341, by limiting its application to financial interests that are vested". Then, it cited its own post- Porcelli I decision in United States v. Helmsley, 941 F.2d 71, 94 (2d Cir. 1991) – as well as a post-Porcelli I decision of the Seventh Circuit, United States v. Bucey, 876 F.2d 1297, 1309-11 (7th Cir. 1989) –both of which had *relied on* Porcelli I, to support its conclusion that the "filing of false tax returns so as to conceal the full amount of taxes due satisfies the limitation imposed by the Supreme Court in McNally without need to seek justification by reference to the State's vested right in a chose in action".

Given the Court of Appeals' conclusion, the Court held

that the convictions for mail fraud (and thus RICO) were sound, and thus there was no basis for *coram nobis* vacatur of the convictions.

## REASONS FOR GRANTING THE WRIT

### I. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE SECOND CIRCUIT'S PUBLISHED DECISION, GIVING AN EXPANSIVE MEANING TO THE WORD "PROPERTY" UNDER THE MAIL FRAUD STATUTE TO INCLUDE AN INTEREST IN UNPAID TAXES THAT THE "VICTIM"-STATE HAS HELD *NOT* TO IMPLICATE PROPERTY BELONGING TO THE STATE, AND THIS COURT'S RECENT DECISIONS LIMITING THE REACH OF FEDERAL JURISDICTION AND OF THE MAIL FRAUD STATUTE, IN *CLEVELAND v. UNITED STATES*, 531 U.S. 12 (2000), *McNALLY V. UNITED STATES*, 483 U.S. 50 (1987), and *JONES V. UNITED STATES*, 529 U.S. 848 (2000).

This case involves the breadth of the mail fraud statute. Over a decade ago, the Second Circuit upheld mail fraud and RICO convictions based on the notion that the failure to remit sales taxes to the State of New York – which at the time did not criminalize sales tax evasion - constituted a scheme to obtain property from the State of New York. This was so, the Second

Circuit then held, "by virtue of the extraordinarily broad sweep of RICO and of the federal mail fraud statute and despite McNally ...." Porcelli I, 865 F. 2d at 1355 (A.31).

Since then this Court has restricted prosecutors' seemingly limitless use of the mail fraud statute, see Cleveland v. United States, 531 U.S. 12, 121 S. Ct. 365 (2000), to embrace definitions of property that, if left to stand, would subsume State law enforcement altogether. In Cleveland, this Court held that a scheme to obtain a video poker license from a State through false information was not prosecutable under the mail fraud statute, because the State's interest in the licenses in its hands did not amount to "property" within the meaning of section 1341.

This Court has also recently limited the use of federal criminal statutes so that federal authorities do not subsume State criminal law enforcement duties under the guise of "Commerce Clause jurisdiction". United States v. Lopez, 514 U.S. 549 (1995) (rejecting expansive views of criminal commerce jurisdiction to preclude attempts by federal prosecutors to prosecute local offenses, there, possessing a gun near a school, in federal courts.); Jones v. United States, 848 U.S. 50 (2000) (holding that arson of a private residence does not satisfy Constitutional Commerce Clause requirements under the arson statute, 18 U.S.C. 844).

This case represents a departure from Lopez and Jones, from Cleveland. and from its parent, McNally v. United States, 483 U.S. 350,107 S. Ct. 2875 (1987). It is important that this Court review it, because, as a published decision, it confuses the waters, so to speak, concerning the appropriate definition of "property", which affects many criminal statutes (as this Court recognized in Cleveland, applying the rule of lenity because the mail fraud statute could also be escalated by use as a predicate for RICO and money laundering). The case involves an important and recurring issues: generally, the breadth of the mail fraud statute, and specifically, its use in tax matters, and cases in "favor" of State- victims that do not themselves criminalize the tax (or other) misconduct.

Here, where New York State itself does not consider the object of a tax evasion scheme to be a scheme to "obtain property" that belongs to the State (as McNally requires), the Second Circuit's decision – affirming the "extraordinarily broad sweep" of the mail fraud statute, stands in stark contrast to Cleveland's lenity and McNally's limitation of the statute to property interests of the victim. This case involves the balance of federal and State powers; it involves Due Process "notice" concerns: Oscar Porcelli certainly could not have believed, much less understood, that he faced a federal prosecution for RICO because he engaged in State sales tax evasion, which

carried civil penalties in the State of New York at that time.

Yet, Oscar Porcelli is told that, though his case "pushes that law to its outer limits" (Porcelli I at 1365, A.31), in the final analysis he committed a grievous wrong under federal law – a wrong that (the Second Circuit said) was properly prosecuted to the *hilt* by the federal government.

As noted, the State of New York did not criminalize the withholding of State sales taxes at the time, and does not consider it larceny. New York State defines larceny as wrongfully taking, obtaining or withholding property, or appropriating it to oneself of another, with intent to deprive another of property permanently. New York Penal Law §155.00(1), (2), and (3), and Penal Law §155.05. Moreover, "property" is defined to include "money, ... property, [and a] thing in action." Penal Law §155.00(1).

Though the New York definition of "property" included a "thing in action", yet, the New York Court of Appeals held, in People v. Valenza, 60 N.Y.2d 363, 469 N.Y.S.2d 642 (1983), that a failure to pay taxes could not be prosecuted as larceny (only New York's *civil* penalties were applicable). The Court of Appeals in the 1989 affirmance of Petitioner's conviction nevertheless upheld the prosecution, because it viewed the mail fraud statute broadly, not with lenity.

Then, in the case that is the basis for Oscar Porcelli's

*coram nobis* petition here, People v. Nappo, 94 N.Y. 2d 564, 708 N.Y.S.2d 41 (2000), New York held squarely that a company's failure to pay over excise taxes due to the State did not constitute theft, or a scheme to steal, property belonging to the State. Taxes due to the State, and not paid because of concealment of the obligation or otherwise, are not property of the State.

Though the Court of Appeals had signalled this in earlier cases, Nappo expressly dealt with the nature of the State's interest in tax debts: Unequivocally, New York Court held that the State did not have a property interest in unpaid collected taxes (that there was thus no larceny, because there was no property belonging to the State that was the subject of the scheme). There was nothing "unique" about a tax debt, according to the State of New York's highest Court.

Nonetheless, the Second Circuit, "slicing and dicing" words as if peoples' lives do not depend on such fine-tuned distinctions, now rules that Nappo does not alter its prior conclusion about the supposed "unique" nature of a tax obligation. It says that in Nappo, the Court did not address whether there was larceny of a "chose in action", which was the basis of the Porcelli I affirmance.

It strains jurisprudential imagination – no less than conflicts with McNally, Cleveland, and the "commerce

jurisdiction" cases, to suggest that the New York Court of Appeals would have upheld the larceny charge if only the very words "chose in action" were used. In point of fact, as the arguments of counsel (reported in the official New York Reporter) make clear, the two sides did advance arguments concerning whether the debt was "unique", or "ordinary" – whether "concealment of tax liability" was different from "withholding" taxes. (See A.24-25, arguments of counsel).

Despite this, the legal community, and the courts in this country, are faced with a published decision of the Second Circuit reaffirming the "broad sweep" of the mail fraud statute and the supposed "unique nature" of "tax debts" that the State itself did not characterize that way. The decision, if left to stand, threatens that citizens who could be punished, if at all, minimally, by their own State for a "wrong" concerning the State's own interests, will, and can, be subjected to federal jail time and forfeiture, as happened here, of *all* his business property to the federal Government. (The RICO forfeitures here were resolved upon remand with the payment of $500,000.00 to the United States).

While it is true that, in Carpenter v. United States, 484 U.S. 19, 25, 108 S. Ct. 316 (1987), decided shortly after McNally, this Court upheld a conviction under § 1341 where an *intangible* property right was involved – there the Wall

Street Journal's confidential business information -- the Court held that McNally had not obviated prosecution for theft (or scheme to steal) intangible property, the nature of that intangible property must also be considered. As the Court realized, "confidential business information", which was stolen by the defendant, "has long been recognized as property." 484 U.S. at 26. The right to exclusive use of it accompanies that property right and is part of it.

But Cleveland's rejection of the applicability of the mail fraud statute to the alleged theft of a State's right of "control" over video poker licenses, made it clear that not all intangible interests of the State are "property" within the meaning of the mail fraud statute: "Even when tied to an expected stream of revenue, the State's right of control does not create a property interest any more than a law licensing liquor sales in a State that levies a sales tax on liquor. Such regulations are paradigmatic" exercises of the States' traditional police powers."

The Cleveland Court further noted that its rejection of the Government's *broad* theories of "property rights" was based not only on the ground that the Government's theories were inconsistent with "traditional concepts of property", but also because the Government's reading of the mail fraud statute "invites us to approve a sweeping expansion of federal

criminal jurisdiction in the absence of a clear statement by Congress." The Court dismissed the idea of a "sweeping" reach of the mail fraud statute – the basis on which the Porcelli I Court of Appeals had upheld Petitioner's mail fraud convictions – because such a "sweeping" reading "would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities."

This case is at odds with Cleveland and with McNally. As stated in Cleveland, which acknowledged the existence of Louisiana State penalties for the regulation of its video poker licenses, in New York there are also penalties for tax violations. "Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes." Cleveland, supra, citing Jones v. United States, 529 U.S. 848, 858, 120 S. Ct. 1904 (2000) (quoting United States v. Bass, 404 U.S. 336, 349,92 S. Ct. 515 (1971)).

The Second Circuit's decision to "push" the mail fraud statute to its "outer limits" because of its supposedly "extraordinarily broad sweep" (A.31), is, finally, inconsistent with the rule of lenity, as reaffirmed in Cleveland: "...[T]o the extent that the word "property" is ambiguous as placed in § 1341, we have instructed that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."

Rewis v. United States, 401 U.S. 808, ... 91 S. Ct. 1056 (1971)." In words that are instructive here, this Court, in Cleveland, stated that this "interpretive guide" – the rule of lenity – is "especially appropriate in construing § 1341 because, as this case demonstrates, mail fraud is a predicate offense under RICO, 18 U.S.C. § 1961(1) (1994 ed., Supp. IV), and the money laundering statute, § 1956(c)(7)(A)." The Court continuied: In deciding what is "property" under § 1341, "it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." United States v. Universal C. I. T. Credit Corp., 344 U.S. 218, 222, 73 S. Ct. 227 (1952).

Oscar Porcelli faced the "harsher alternative" because the Second Circuit believed, in contrast the rule of lenity, invoked in Cleveland, that the "sweep" of the mail fraud statute is "extraordinarily broad". On this *coram nobis* petition, the Second Circuit then went to great lengths to find some difference – supposedly of substance -- between labeling the "tax debt" a "chose in action", and recognizing it as a tax claim, which was fully dealt with in Nappo, and which *makes sense.* (After all the State still had its tax claim, of which the State of New York could never be "permanently deprived".

We should note, too, that though the Court of Appeals below, and the Porcelli I majority, keeps referring to a "chose

in action" as the subject of the scheme to defraud charged and tried in that case, in point of fact, as noted by the dissent in Porcelli I, the indictment in the case did not charge that Mr. Porcelli had schemed to defraud the State of New York of a "chose in action" (its claim to taxes). The indictment, and the jury charge, "described his offense as defrauding New York of `sales taxes due on the retail sale of gasoline." The first time that "chose in action" was used, was by present counsel who, in the appellate briefs, used the term to describe why it should not be deemed to be capable of being "stolen" from the State, and which was not charged in any event.

There is nothing "federal" about filing fraudulent tax returns. It is no "worse", nor different, than filing no returns in order to "conceal" an excise tax debt, as were the facts in Nappo. Despite the Second Circuit's insistence to the contrary, this case may have involved a "scheme to defraud" and to enrich oneself, but it does not involve a scheme to permanently deprive the State of its property, as that term was interpreted in McNally and its progeny.

Mr. Porcelli was convicted of a *non-crime*. He should be entitled to *coram nobis* relief vacating his convictions.

We finally note that this Term, this Court is considering another case dealing with "property" definitions for purposes of federal jurisdiction. Scheidler v. NOW, Inc., No. 01-1118

*with* Operation Rescue v. NOW, Inc., No. 01-1119, were thus argued on December 4, 2002. In these consolidated cases, this Court is resolving the issue whether abortion protesters' denial of access to the abortion clinics qualifies as extortion of *property* under the Hobbs Act, 18 U.S.C. §1951. Because issues concerning the definitions of "property", as those definitions impact on the breadth of federal law, are before the Court now, and because this cases raises similar, troubling concerns, the Court should grant certiorari, vacate the Second Circuit's judgment, and vacate Mr. Porcelli's unjust convictions.

**II. THE COURT SHOULD CLARIFY THE REQUIREMENTS OF *CORAM NOBIS* RELIEF TO MAKE CLEAR THAT (A) CONVICTION FOR A NON-CRIME WARRANTS *CORAM NOBIS* RELIEF, AND THAT (B) THE DEFENDANT'S DISQUALIFICATION TO SIT AS A JUROR BECAUSE OF A FELONY CONVICTION IS A SUFFICIENT "CONTINUING CONSEQUENCE" TO JUSTIFY VACATUR OF A CONVICTION.**

While the Second Circuit did not directly address the district court's denial of *coram nobis* relief on the ground that Petitioner had not shown "continuing consequences", presumably it upheld the district court's rationale concerning the meaning of "continuing consequences". Petitioner respectfully suggests that this Court should direct the Court

that, if it is determined that Petitioner was convicted of a *non*-crime, *coram nobis* relief is proper, as was held in United States v. Peter, 2002 U.S. App. LEXIS 22442 (11th Cir. October 28, 2002) (holding, on the basis of Cleveland, that the *coram nobis* petitioner had not committed any crime, and so was entitled to vacatur of his conviction because, as this Court has recognized in reaffirming the vitality of *coram nobis*, "the results of the conviction may persist". United States v. Morgan, 346 U.S. 502, 74 S.Ct. 247 (1954).

Even if some *concrete* "continuing consequence" must be shown, this Court should make clear to the lower courts that, in an "extraordinary" case, such as this one, the loss of the right to sit as a juror is no less important as a disability, than is the right to vote. Indeed, this Court recognized the right to sit as a juror as such a continuing consequence, in Carafas v. La Vallee, 391 U.S. 234, 237, 88 S. Ct. 1556-38 (1968) (holding that collateral consequences of the petitioner's conviction, include defendant's "inability to vote, engage in certain businesses, hold public office, or serve as a juror".

The district court in this case stated that it was "not at all clear that petitioner has such a right" – i.e., to sit as a juror (A.20), and worried (A.21 n.1) that, if the loss of the ability to sit as a juror "were a sufficient continuing collateral consequence to merit coram nobis review, few felony

convictions would ever be final."

Though the point was argued, the Second Circuit did not state its disagreement with the district court. The published opinion leaves uncertainty, at best, and creates a "hierarchy" of "rights" to be determined at the whim of a district judge and the appeals court that reviews the determination.

It should be noted that, in fact, as a post-district-court supplementation to the record made clear, the Petitioner received a Notice to Petitioner for Jury Service received shortly before the *coram nobis* petition was brought; Petitioner was told he could not sit because of his felony conviction. Regardless, notions of "finality" of criminal judgments are important, but it is an error "of the most fundamental character", Morgan, supra, 346 U.S. at 509 n.15, that an individual should suffer *any* continuing consequences, whether affecting all felons (as the New York bar on the right to sit a a juror), or few, on the basis of a conviction of a "non-crime".

This Court should grant a Writ of Certiorari, and vacate the judgment with instructions to grant the Writ of Coram Nobis.

## CONCLUSION

For the reasons set forth above, this Court should grant a writ of certiorari to the Court of Appeals for the Second Circuit, should vacate the Second Circuit's judgment, and should Order the convictions vacated.

December 2002

Respectfully submitted,

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*Counsel for Petitioner*

# APPENDIX


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OSCAR PORCELLI, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.
Docket No. 01-2496

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

303 F.3d 452; 2002 U.S. App. LEXIS 18776

April 4, 2002, Argued
September 13, 2002, Decided

PRIOR HISTORY: [**1] Petitioner, an operator of gas stations, was convicted of federal mail fraud for participating in a scheme to defraud the State of New York of sales taxes due. He appeals from the denial of a petition for habeas corpus under *28 U.S.C. § 2255* by the United States District Court for the Eastern District of New York (Sifton, J.). Petitioner contends that a recent decision of the New York Court of Appeals establishes that unpaid sales taxes are the not the property of the State, and therefore, under *McNally v. United States, 483 U.S. 350, 97 L. Ed. 2d 292, 107 S. Ct. 2875 (1987)*, a scheme designed to defraud the State of sales taxes due is not prosecutable under *18 U.S.C. § 1341*.

COUNSEL: VIVIAN SHEVITZ, South Salem, NY, for Petitioner-Appellant.

EMILY BERGER, Assistant United States Attorney, for Alan Vinegrad, United States Attorney for the Eastern District of New York (Susan Corkery on the brief), Brooklyn, NY, for Respondent-Appellee.

JUDGES: Before: NEWMAN, KEARSE, and LEVAL, Circuit Judges.

OPINIONBY: LEVAL

OPINION:
[*453] LEVAL, Circuit Judge:

Oscar Porcelli appeals from an order of the United States District Court for the Eastern District of New York (Sifton, J.) dismissing his petition for habeas corpus under *28 U.S.C. § 2255* seeking to set aside convictions under the federal mail fraud statute, *18 U.S.C. § 1341*, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1962*(c). Porcelli was convicted after a jury trial for his role in filing fraudulent New York State sales tax returns for gas stations owned by his corporations. This is Porcelli's third attempt in this court to overturn the conviction. The first, Porcelli I, was his unsuccessful direct appeal from the judgment of conviction. See *United States v. Porcelli, 865 F.2d 1352 (2d Cir. 1989)*. The second, Porcelli II , was his unsuccessful appeal from the district court's denial of his first habeas corpus petition under *28 U.S.C. § 2255*. See *Porcelli v. United States , 964 F.2d 1306 (2d Cir. 1992)*. This appeal is from the district court's denial of his second § 2255 petition. In these decisions, we have repeatedly rejected his claim that under *McNally v. United States, 483 U.S. 350, 97 L. Ed. 2d 292, 107 S. Ct. 2875 (1987)*,[**3] the mail fraud statute does not encompass fraudulent schemes designed to reduce sales tax liability. Porcelli now claims that a recent opinion of the New York Court of Appeals, *People v. Nappo, 94 N.Y. 2d 564, 708 N.Y.S.2d 41, 729 N.E.2d 698 (2000)*, establishes that uncollected and unremitted sales taxes are not the property of the State, and thus undermines the basis for his mail fraud conviction. We again reject his argument and affirm.

BACKGROUND

The background of this case is described in detail in our January 1989 decision in the appeal from the district court's initial judgment of conviction. See *Porcelli I, 865 F.2d at 1356-57.* We restate it here only briefly.

[*454] A. The Trial

The evidence presented at trial was as follows. In 1973, Porcelli began acquiring and operating a chain of retail gasoline stations in New York. By 1982, he owned seventeen gas stations, each organized as a separate corporation. He ultimately consolidated his holdings into one corporation known as Gaseteria Oil Corporation, Inc. ("Gaseteria"). See *Porcelli I, 865 F.2d at 1356.*

Between 1978 and 1982, Porcelli caused his corporations to underreport the gasoline sales of his stations by approximately $60,000,000, resulting in an underpayment of $4,755,000 of state sales taxes. Porcelli's accountant, Murray Katz, testified that Porcelli repeatedly instructed him to prepare tax returns that understated the sales of gasoline. After receiving notices from state authorities of outstanding tax obligations, Porcelli offered Katz a $200,000 bribe to induce him to plead guilty to filing the false returns and to accept sole responsibility for the frauds. See *id. at 1356-57.*

On September 30, 1987, Porcelli was convicted in the Eastern District of New York (Sifton, J.), following a jury trial, of 61 counts of mail fraud and one count of violating RICO. Under the RICO forfeiture provisions, *18 U.S.C. § 1963,* the jury also returned a verdict of forfeiture of $4,755,000 representing the unpaid sales taxes, as well as of thirty-four of Porcelli's corporations that were found to be instrumentalities and proceeds of his racketeering activities. The district court

sentenced Porcelli to concurrent split-sentence terms of two-years' imprisonment on each of the sixty-two counts, with all but six months suspended, and probation for five years, and ordered restitution to the State of New York.

B. Direct Appeal

On his direct appeal, Porcelli contended (1) where the laws of the State of New York did not provide criminal punishment for the failure of a vendor to remit sales taxes, the use of the criminal provisions of the federal mail fraud statute against him violated due process; (2) as to the counts of mail fraud, the mailing by the State to the defendant of blank sales tax return forms was insufficiently related to the defendant's fraud scheme to satisfy the jurisdictional element of use of the mails; (3) following the Supreme Court's decision in *McNally v. United States, 483 U.S. 350, 97 L. Ed. 2d 292, 107 S. Ct. 2875 (1987),* the mail fraud statute did not apply to tax fraud; (4) the evidence was insufficient to satisfy the "enterprise" element for the RICO violation; (5) the forfeiture order was overbroad and was not supported by sufficient evidence; and (6) he received ineffective assistance of counsel.

We rejected all but two of his claims. We agreed that the mailing of blank tax forms by the State tax agency was not sufficiently closely related to the defendant's tax fraud scheme to satisfy the jurisdictional element of use of the mails in furtherance of a scheme to defraud, and accordingly reversed six counts of the mail fraud convictions. *Porcelli I, 865 F.2d at 1359.* We also vacated and remanded portions of the forfeiture order on the grounds that it included certain of Porcelli's "corporations as to which the Government did not prove any direct receipts from the fraudulent gas station corporations." *Id. at 1356.*

Over Judge Newman's dissent, we rejected Porcelli's claim that the federal mail fraud statute does not encompass state sales tax violations. Porcelli argued that under McNally, Section 1341 applies only to fraudulent schemes that deprive victims of vested property rights and therefore [*455] does not apply to tax fraud because the State has only a claim, and not a vested property right, in the money owed as sales tax. We disagreed. We held that, assuming Porcelli correctly describes the scope of § 1341, his challenge nonetheless fails, as his scheme to file false tax returns deprived the State of a property right -- a "chose in action" representing the State's tax claim against the taxpayer. By concealing sales taxes due, Porcelli's scheme sought to deprive the State of its chose in action. *Id. at 1359-62.*

C. Porcelli's first § 2255 Petition

In 1990, Porcelli brought a first petition for habeas corpus under *28 U.S.C. § 2255* before the trial court, based on the New York Court of Appeals's decision in *State v. Barclays Bank of New York, N. A., 76 N.Y. 2d 533, 561 N.Y.S.2d 697, 563 N.E.2d 11 (1990).* He argued that the Barclays decision undermined the basis on which his mail fraud convictions had been affirmed in Porcelli I. In Barclays , an accountant took his clients' checks made payable to the State taxing authorities, forged endorsements, and deposited them in his own account at Barclays Bank. Barclays collected the checks from the drawee banks and permitted the accountant to withdraw proceeds. The State sued Barclays to recover the funds. The New York Court of Appeals affirmed the dismissal of the actions, explaining that, because the checks were never actually or constructively delivered to the State, it "never acquired a property interest in them and cannot be said to have suffered a loss." *Id. at 540-41.*

Porcelli argued that the Barclays ruling confirmed his contention that taxes owing to the State were not the property of the State, with the consequence that a fraudulent scheme concealing those tax obligations did not deprive the State of its "property" and, under McNally, was not within the scope of § 1341. Judge Sifton denied the petition and we affirmed. See *Porcelli II, 964 F.2d at 1308.* We read Barclays to "focus[] on the physical checks, not the taxes they represented" or the "right of the state to be paid sales taxes by a vendor." Id. Unlike Porcelli, the bank in Barclays was not statutorily obligated under New York law to collect and remit taxes. Id.

D. Porcelli's Current § 2255 Petition

On April 26, 2000, Porcelli filed the present § 2255 petition, again before the trial court. He contends that *People v. Nappo, 94 N.Y. 2d 564, 708 N.Y.S.2d 41, 729 N.E.2d 698 (2000),* demonstrates that uncollected and unremitted sales taxes are not the State's property. In Nappo, the defendants were charged with, inter alia, larceny and conspiracy to[**9] commit larceny for their involvement in a scheme to import motor fuel from New Jersey to New York without paying or reporting motor fuel taxes due, as required under New York Tax Law. The New York Court of Appeals reversed the larceny convictions on the grounds that, prior to remittance, the State was not the owner of unpaid taxes. Accordingly, defendants did not steal money that belonged to the State and were not guilty of larceny.

Judge Sifton denied Porcelli's petition on alternate grounds. See Porcelli v. United States, No. 00-2500 (E.D.N.Y. Jul. 13, 2001). The court initially found that Porcelli, who was neither imprisoned nor on parole or probation at the time of filing his petition, could not satisfy the requirement of being a "prisoner in custody," eligible to bring a petition under § 2255. The court considered whether the petition could stand as a petition for a writ of error coram nobis, which does not require the petitioner

to be "in custody" but does demand that the petitioner demonstrate continuing legal consequences from his conviction [*456]that may be remedied by granting the writ. Finding that the 1987 conviction had no further legal consequences that would satisfy the requirements for coram nobis, the district court denied the writ.

The court ruled alternatively on the merits. It found that the Nappo ruling that there was no taking of property such as would support a larceny conviction did not bar prosecution for fraud under § 1341.

Porcelli now appeals that decision.

DISCUSSION

Porcelli asserts that the Nappo ruling establishes that under New York law the State does not possess a vested property right in unpaid taxes. He claims that this decision undermines the basis of our affirmance of his mail fraud convictions in Porcelli I. We disagree. Even assuming that the federal mail fraud statute, as construed by McNally, requires a scheme to deprive a victim of a property right that is vested, Nappo occasions no reason to retreat from our decisions in Porcelli I and II.

The federal mail fraud statute prohibits "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses." *18 U.S.C. § 1341.* There can be no question that Porcelli obtained money for his corporations by false or fraudulent pretenses, in that he reduced their tax bill by fraudulently understating their sales. Porcelli nonetheless argues that his underreporting of gasoline sales could not support a § 1341 mail fraud conviction because the Supreme Court ruled in McNally that such a fraud scheme

must deprive the victim of a vested property right, and his conduct did not deprive the State of a vested property right.

We held in Porcelli I that Porcelli's conduct sought to conceal its sales and thus deprive the State of New York of a vested right in a chose in action. We found that where a vendor has not paid its sales tax obligation, the State possesses a chose in action constituting its right to sue the vendor for the sales taxes the vendor was obligated to remit. Porcelli engaged in a scheme to underreport his gasoline sales and thus concealed his obligation to pay substantial sales taxes. The purpose of the scheme was to conceal from the State its cause of action for unpaid taxes. Such a scheme would effectively deprive the State of its chose in action and thus satisfy any requirement under the mail fraud statute that the object of fraudulent scheme be to deprive the victim of an existing property right. See *Porcelli I, 865 F.2d at 1361.*

The Nappo decision does not alter our conclusion. In Nappo, the defendants were charged with larceny in that they failed to report the importation of motor fuel into the State of New York and to pay taxes required by New York law on such importation. New York contended that the failure to pay the taxes due "constituted a larceny of property owned by the State of New York." *94 N.Y. 2d at 566.* The Court of Appeals pointed out that "the taxes due were not the property of the State prior to their remittance," and that the Penal Law defines larceny as "taking, obtaining or withholding property from an owner thereof." *Id . at 566-67;* New York Penal Law § 155.05(1). The defendants' failure to report their fuel importation and pay taxes due thereon did not constitute a taking, obtaining, or withholding of moneys that belonged to the State, any more than a debtor's intentional failure to pay a debt would constitute larceny of the creditor's moneys.

The holding of Nappo is not inconsistent with ours. In Nappo, the State did not argue, and the Court did not address, whether a chose in action representing a [*457] claim for unpaid taxes is property of the State. That would in any event have been irrelevant because there had been no taking, obtaining or withholding of the chose in action. What the defendants had done was rather to conceal its existence, by not reporting their importation of fuel. They had committed a fraud, but not a larceny, and larceny was the crime charged.

The defendant here was not charged with theft of the State's property. He was charged with fraudulently underreporting a sales tax obligation so as to reduce his payment of sales taxes. The fact that the State was not the proprietor of the money the defendant was obligated to pay in taxes, and that the defendant did not larcenously take State money does not contradict that he used fraud to conceal from the State its claim for sales taxes and thus effectively deprived the State of it property right in its chose in action. We again reject Porcelli's claim. n1

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n1 I offer one further observation. In my view, Porcelli's argument misunderstands and distorts the meaning of the Supreme Court's decision in *McNally v. United States, 483 U.S. 350, 97 L. Ed. 2d 292, 107 S. Ct. 2875 (1987)*. What the Supreme Court meant in McNally was that the concept of fraud, as incorporated in the federal mail fraud statute, was not satisfied by a scheme to deprive the victim of abstract values such as the right to honest government, but required a scheme aimed against the monetary or property interests of the victim. It did not intend to require that the victim's property interests be limited to vested rights.

In McNally, the defendants, a public official of the Commonwealth of Kentucky and another person affiliated with him, were charged with violating § 1341 by participating in a secret scheme to require the insurance

agency that sold insurance to the State to share its commissions with companies in which defendants had an interest. The theory of the prosecution was that defendants' participation in this kick-back scheme "defrauded the citizens and government of Kentucky of certain 'intangible rights,' such as the right to have the Commonwealth's affairs conducted honestly." *483 U.S. at 352.* There was no showing, nor was the jury charged, that defendants' scheme had deprived Kentucky of money or "that in the absence of the alleged scheme the Commonwealth would have paid a lower premium or secured better insurance." *Id. at 360.* The Supreme Court overturned the convictions on the grounds that § 1341 does not encompass schemes that deprived citizens of their right to honest and good government. It held that the "the words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'" *Id. at 358* (citation omitted).

Porcelli reads this language of McNally to suggest that for § 1341 to apply, the mail fraud scheme must deprive the victim of a vested right in property. In my view, this misunderstands the Supreme Court's purpose. The Court's point was that the term "fraud" as used in § 1341 was limited to its familiar common law meaning, which involved using falsity to do the victim out of money or property interests -- not the expansive meaning adopted by the Courts of Appeals encompassing a deprivation of abstract values like honest government. There was no issue before the Court as to whether the victim's lost financial interest needed to be a vested right. Where the Court said that "the words 'to defraud' commonly refer 'to wronging one in his property rights,' " *id. at 358* (emphasis added), there was no suggestion that the Court meant anything different from doing one out of "his property interests." I

believe that Porcelli's focus on the Supreme Court's use of the word "rights," as implying the need for vested property, reads an unintended limitation into the opinion. The Supreme Court meant that § 1341 did not expand the familiar notion of fraud into deprivations of abstract values. Porcelli mistakenly reads the opinion as narrowing the meaning of fraud, as embodied in § 1341, by limiting its application to financial interests that are vested.

Where a defendant engages in a scheme to underreport his sales (or other financial activity) with the objective of concealing the full amount of his tax obligation, this involves doing the State out of the kind of interest in money or property that the Supreme Court intended to describe as covered by § 1341. In Porcelli's three appeals, we have reached the same result relying on the State's ownership of the chose in action representing its claim for unpaid taxes. But I believe the filing of false tax returns so as to conceal the full amount of taxes due satisfies the limitation imposed by the Supreme Court in McNally without need to seek justification by reference to the State's vested right in a chose in action. See *United States v. Helmsley, 941 F.2d 71, 94 (2d Cir. 1991)* (scheme to file false personal and business returns to state taxing authorities satisfied § 1341' s requirement of a scheme to deprive the victim of money or property, even where there was no proof of taxes actually due to the state); *United States v. Bucey, 876 F.2d 1297, 1309-11 (7th Cir. 1989)* (finding that tax fraud scheme satisfies McNally's requirement of a property interest, even where defendant's tax obligation was due and owing and not immediately vested in the government); *United States v. Regan, 699 F. Supp. 36, 40 (S.D.N.Y. 1988)* (in a § 1341 prosecution for tax fraud, noting that "whether the government had a vested property interest during the life of the scheme is irrelevant. If the alleged scheme had been

brought to fruition, it would have fraudulently deprived the government of tax receipts").

[*458] CONCLUSION

The judgment of the district court is AFFIRMED.

Oscar Porcelli, Petitioner, -against-United States ofAmerica, Respondent.
CV-00-2500 (CPS)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEWYORK

2001 U.S. Dist. LEXIS 24649

July 13, 2001, Decided

SUBSEQUENT HISTORY: *Affirmed by Porcelli v. United States, 2002 U.S. App. LEXIS 18776* (2d Cir. N.Y. Sept. 13, 2002)

COUNSEL: For Oscar Porcelli, PETITIONER: Vivian Shevitz, Esq, South Salem, NY USA.

OPINION: MEMORANDUM AND ORDER

SIFTON, Senior Judge

Oscar Porcelli petitions pursuant to *28 U.S.C. § 2255* to vacate his conviction under the federal mail fraud statute, *18 U.S.C. § 1341*, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1962*(c). Porcelli was convicted following a jury trial on December 16, 1986, based on his fraudulent filing of New York State sales tax returns for gas stations owned by him and his corporations. The conviction was affirmed by the court of appeals in an opinion addressing a variety of legal challenges by the defendant, including the issue of whether Porcelli's scheme contemplated that the state would be deprived of a property interest. *United States v. Porcelli, 865 F.2d 1352 (2d Cir. 1989).* Porcelli now claims that a case decided by the New York State Court of Appeals subsequent to his appeal

establishes[*2] that the federal court of appeals erred on an issue of New York law vital to its affirmance of his conviction, that is, the question whether the uncollected and unremitted sales taxes constituted property of the State of New York.

For the reasons set forth below, Porcelli's habeas petition is treated as an application for a writ of error coram nobis and, as such, is denied.

BACKGROUND

Porcelli entered the retail gasoline business in 1973 in partnership with an individual named Jimmy Sorentino. After terminating his partnership in 1979, Porcelli owned or acquired seventeen gas stations under the corporate name Gaseteria. Between the years 1979 and 1982, Porcelli failed to report gasoline sales in excess of $60,000,000 on state sales tax forms, resulting in an underpayment of $4,755,000 of state sales taxes.

On the appeal of his mail fraud and RICO convictions, the court of appeals, by a divided panel, held that Porcelli's scheme to defraud New York State of property was appropriately supported by a view of sales taxes as property belonging to New York State. *Porcelli, 865 F.2d at 1359.* The denial of Porcelli's first habeas petition under *28 U.S.C. § 2255,*[*3] in which he challenged his mail fraud convictions on the same issue presented here based on the subsequently decided case of *State v. Barclay's Bank of New York, 76 N.Y.2d 533 (1990),* was also affirmed by the court of appeals on May 27, 1992. See *Porcelli v. United States, 964 F.2d 1306 (2d Cir. 1992).*

The present application was filed on April 26, 2000, subsequent to the decision by the New York State Court of

Appeals in *People v. Nappo, 94 N.Y.2d 564, 708 N.Y.S.2d 41, 729 N.E.2d 698 (2000),* decided earlier the same month.

DISCUSSION

Plaintiff brings this application under *28 U.S.C. § 2255,* which states in part as follows:

A prisoner in custody under sentence of a court ... claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States ... or is otherwise open, to collateral attack, may move the court which impose the sentence to vacate, set aside or correct the sentence.

The government argues that, because Porcelli concluded his six-month sentence and five-year probation more than five years ago, Porcelli cannot meet[*4] the habeas statute requirement of being "in custody." For his part, Porcelli claims that, while he is neither imprisoned nor on parole or probation, he continues to suffer collateral consequences as a result of his conviction sufficient to meet the statutory "in custody" requirement. Without considering Porcelli's argument that he is currently suffering collateral consequences from his conviction, those consequences do not meet the "in custody" requirement. Where a petitioner "has been released from custody prior to filing his habeas petition, collateral consequences alone are insufficient to satisfy the 'in custody' requirement." *Crescenzi v. Supreme Court of the State of New York, 749 F. Supp. 552, 555 n.3 (S.D.N.Y. 1990)* (citing *Maleng v. Cook, 490 U.S. 488, 491-93, 104 L. Ed. 2d 540, 109 S. Ct. 1923 (1989));* see also *Jamison v. People of the State of New York, No. CV-92-7219, 1993 WL 541666* (S.D.N.Y. Dec. 28, 1993) (same). Accordingly, Porcelli cannot pursue his claim through a writ of habeas corpus.

There is no "in custody" requirement, however, for the issuance of a writ of error coram nobis. The Supreme Court held in *United States v. Morgan, 346 U.S. 502, 98 L. Ed. 248, 74 S. Ct. 247 (1954),*[*5] that the federal courts are "authorized to grant the ancient common law writ of error coram nobis under the terms of the All Writs Act, *28 U.S.C. § 1651*(a)." *Fleming v. United States, 146 F.3d 88, 89-90 (2d Cir. 1998)* (per curiam). A writ of error coram nobis is "essentially a remedy of last resort for petitioners who are no longer in custody pursuant to a criminal conviction and therefore cannot pursue direct review or collateral relief by means of a writ of habeas corpus." *Fleming, 146 F.3d at 89-90.*

The Supreme Court emphasized in Morgan that "continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice." *Morgan, 346 U.S. at 511;* see also *Foont v. United States, 93 F.3d 76, 78 (2d Cir. 1996).* The Court of Appeals for this Circuit has held that to obtain coram nobis relief, a petitioner must demonstrate that "(1) there are circumstances compelling such action to achieve justice, (2) sound reasons exist for failure to seek appropriate[*6] earlier relief, and (3) the petitioner continues to suffer legal consequences from his conviction that may be remedied by granting the writ." *Foont, 93 F.3d at 79* [internal quotations and citations omitted].

The government does not dispute that Porcelli meets the first two prongs of the test. Porcelli contends that the federal courts have applied a mistaken interpretation of state law with respect to a critical element of his federal conviction. A correct interpretation would make clear that Porcelli was wrongfully convicted. It would, accordingly, be in the

interest of justice to hear his argument on an application for a writ of error coram nobis. Moreover, "sound reasons exist for failure to seek appropriate earlier relief" in this case. See id. The argument on which Porcelli's application is based relies solely on a New York Court of Appeals decision dated April 13, 2000. Accordingly, Porcelli's April 26, 2000 application could hardly have been sought any earlier than its date of filing.

The government argues, however, that there are no continuing legal consequences from his conviction. The requirement that the petitioner demonstrate continuing legal consequences[*7] from his conviction derives from the Supreme Court's observation in Morgan that, "although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected." *Morgan, 346 U.S. at 512-13.* Accordingly, the Second Circuit has found continuing legal consequences that would support granting the writ where a prior conviction deprives a petitioner of his right to vote, see *Kyle v. United States, 288 F.2d 440, 441 (2d Cir. 1961)* (per curiam), or serves as an "aggravating factor" in sentencing for a subsequent offense, see *Nicks v. United States, 955 F.2d 161, 167 (2d Cir. 1992).*

Porcelli argues that he is suffering continuing legal consequences as a result of his inability to return to employment with Gaseteria, his inability to obtain a liquor license, and the virtual impossibility of "taking [Gaseteria] public because of Mr. Porcelli's having been convicted of a felony." Considering each of these consequences individually and as a group, Porcelli fails to make the showing required in order for this Court to consider granting a writ of error coram nobis.[*8]

With respect to Porcelli's ability to return to Gaseteria, the source of this penalty is not Porcelli's criminal conviction, but a stipulation and order entered in the bankruptcy court following his conviction. Under this stipulation and order resolving Porcelli's bankruptcy, it was ordered that "Mr. Porcelli shall not operate a business or maintain an office at the headquarters of Gaseteria Oil Corp., nor shall Mr. Porcelli perform any construction or renovation activities at Gaseteria properties for so long as there are any amounts due and owing" under prior paragraphs of the agreement. While Porcelli is barred from working at Gaseteria so long as he owes money as a result of his bankruptcy, overturning his criminal conviction will have no effect on the requirements of the stipulation and order resolving Porcelli's bankruptcy proceedings.

The remaining two consequences referred to by Porcelli also fail to satisfy the legal consequences test. Porcelli argues that he has considered obtaining a liquor license, but his criminal conviction, which prohibits him from obtaining such a license, stands in his way. In addition, Porcelli argues that it is "virtually impossible" for Gaseteria[*9] to go public as a result of his felony conviction and that this obstacle to going public should be removed. Porcelli's claim is, however, "purely speculative, and as such ... not ... sufficient to justify invoking the extraordinary remedy of coram nobis relief." *Fleming, 146 F.3d at 91* [internal quotations and citations omitted].

In Fleming, it was argued that Fleming suffered legal consequences because he was "disabled from employment in a variety of financial jobs." Id. In ruling this harm too speculative, the Second Circuit stated that the "record contains no evidence that petitioner has sought and been denied licensure as a securities broker, that he has ever been so employed in the past, or that he could obtain such

employment but for his conviction." Id. This reasoning applies to Porcelli's inability to obtain a liquor license. With respect to taking Gaseteria public, Porcelli has submitted an affidavit from Louis Fresolone, Chief Financial Officer of Gaseteria, stating that "whenever Gaseteria has attempted to gain financing or discussed 'going public,' Mr. Porcelli's felony conviction is mentioned as a prohibitive factor." No evidence has, however, [*10]been presented that Gaseteria "could obtain such [financing or go public] but for [Porcelli's] conviction." Id. Moreover, as Porcelli has been completely divested of any ownership of or interest in Gaseteria, the company's inability to obtain financing or "go public" is not a continuing legal consequence to Porcelli.

At oral argument and in subsequent submissions to this Court, Porcelli asserted two more continuing legal consequences of his conviction: his payment of a $500,000 fine and his inability to serve as a juror.

With respect to the $500,000 fine, plaintiff relies on case law stating that the payment of a fine is a collateral consequence of a conviction in the context of § 2255 habeas petitions. See *Williamson v. Gregoire, 151 F.3d 1180, 1183 (9th Cir. 1998)* (citing cases). However, in order to consider the merits of a writ of coram nobis, there must not only be collateral consequences, but those collateral consequences must be continuing. As this Court held in *United States v. Reguer, 901 F. Supp. 515, 518 (E.D.N.Y. 1995),* "Reguer's continuing obligation to pay the fines imposed on him satisfies the continuing consequences [*11] requirement of the writ [of coram nobis]." Here, there is no continuing responsibility to pay any money whatsoever in connection with Porcelli's conviction. As the past payment in full of Porcelli's fine in this case does not present a "continuing collateral consequence" of Porcelli's conviction, the fine does not give this Court coram nobis jurisdiction.

Plaintiff's final claim of a continuing collateral consequence is that he is barred from jury service, presumably by operation of *28 U.S.C. § 1865*(b)(5). As the Supreme Court has stated, "all qualified citizens have a civic right, of course, to serve as jurors ...." *Powers v. Ohio, 499 U.S. 400, 424, 113 L. Ed. 2d 411, 111 S. Ct. 1364 (1991);* see also *Bershatsky v. Levin, 920 F. Supp. 38, 39 (E.D.N.Y. 1996)* (stating that "jury service is a duty and a right of citizenship"); *United States v. Madonia, 1990 U.S. Dist. LEXIS 20851, No. CR-78-143, 1990 WL 68887,* at *2 (E.D.N.Y. May 16, 1990) (noting that among the legal disabilities which attach upon conviction are "the loss of the right ... to serve as a juror"). As a result of the criminal conviction that Porcelli challenges here, Porcelli[*12] has lost this right, an undeniable continuing consequence of his conviction. It remains unclear, however, whether such a continuing consequence is sufficient to allow this Court to consider petitioner's coram nobis claims.

The Court of Appeals for this Circuit has found sufficient to warrant coram nobis review a prior conviction that deprived a petitioner of his right to vote, see *Kyle, 288 F.2d at 441* (per curiam), or served as an "aggravating factor" in sentencing for a subsequent offense, see *Nicks v. United States, 955 F.2d at 167.* In *Carafas v. La Vallee, 391 U.S. 234, 237, 20 L. Ed. 2d 554, 88 S. Ct. 1556-38 (1968),* the Supreme Court held in a habeas case that the collateral consequences of the petitioner's conviction, "his inability to vote, engage in certain businesses, hold public office, or serve as a juror," prevented the case from being moot.

In this case, perhaps because of the casual way in which the right to serve on a jury was invoked at oral argument, it is not at all clear that petitioner has such a right. There is no

evidence that he has ever been randomly selected for jury service in this or any other district or completed or returned a juror [*13]qualification form, claiming no exemptions sought despite his conviction to have his civil rights restored or otherwise been deemed unqualified by reason of his conviction pursuant to *28 U.S.C. 1865* et seq. In the absence of such a record, the alleged deprivation of petitioner's right to serve on a jury seems at least as speculative as his right to obtain a liquor license and is an inadequate basis on which to authorize coram nobis review. n1

n1 It is noteworthy that, if the operation of *28 U.S.C. § 1865* were a sufficient continuing collateral consequence to merit coram nobis review, few felony convictions would ever be final.

In any event, even considering Porcelli's petition on the merits, it is without merit.

Porcelli argued during trial and on appeal of his conviction that the mail fraud statutes were not intended to apply to his tax violations. He argued that *McNally v. United States, 483 U.S. 350, 97 L. Ed. 2d 292, 107 S. Ct. 2875 (1987),*[*14] made clear that "the statute protects only a state's interest as a property holder." *United States v. Porcelli, 865 F.2d 1352, 1359 (2d Cir. 1989).* As the Court in McNally stated, "the words to defraud commonly refer to wrongdoing one in his property rights by dishonest methods or schemes and usually signify the deprivation of something of value by trick, deceit, chicane, or overreaching." *McNally, 483 U.S. at 358-59* (emphasis added).

When the Second Circuit considered Porcelli's appeal, it noted that the "question would be easy if Porcelli had actually collected the tax on his sales" and then merely failed to remit the collected taxes. *Porcelli, 865 F.2d at 1360.* However, as the court noted in that appeal, "the Government did not prove actual collection of the tax." Id.

The court of appeals then went on to note that "in any event, New York State lost money as a result of Porcelli's schemes, that is to say, lost the sales tax proceeds due from his sales of gasoline even though it maintains a civil right, or chose in action, to obtain those proceeds." Id. After analyzing state law concerning Porcelli's obligation to the[*15] state to collect and pay taxes, the court stated:

He was obliged to pay the tax whether or not he collected it from the customers. By virtue of his scheme to defraud, i.e., the false sales tax returns, he was in a very real sense "depriving" the State of its property. The fact that the State has a claim, a chose in action, for the difference between what was paid and the tax shown on the false return may mean that it has not finally been deprived of that chose in action. However, the fact remains that until the fraud was discovered it had been deprived of its property.

Porcelli's conduct, in short, was aimed at depriving the State of its property, the choses in action ...

Id.

The recent New York Court of Appeals decision in *People v. Nappo, 94 N.Y.2d 564, 708 N.Y.S.2d 41, 729 N.E.2d 698* (Apr. 13, 2000), has no effect on this reasoning. In Nappo, the defendants were indicted on charges arising from their alleged involvement in a scheme to import motor fuel without filing reports or paying taxes required by law. The defendants moved

to dismiss the count of the indictment charging them with larceny of the unpaid sales taxes on the ground that New[*16] York was not the owner of unpaid taxes. The New York State Court of Appeals held that "the taxes due were not the property of the State prior to their remittance." Thus, neither the accusation in the case nor the Court's decision dealt with the theory on which petitioner's case was affirmed, namely, that petitioner engaged in a fraudulent scheme to deprive the state of a chose in action.

In addition, the Nappo case involved the statutory obligation of a business entity to pay its own taxes, see *Nappo, 94 N.Y.2d 564, 708 N.Y.S.2d 41, 729 N.E.2d 698.* In this case as noted at *865 F.2d at 1360,* the court dealt with the obligation of a vendor to collect taxes from its customers "as trustee for and on account of the state" was at issue. N.Y. Tax Law § 1132(a). Accordingly, the facts and legal arguments that supported dismissal of a larceny count in Nappo do not affect the reasoning of the Second Circuit's upholding of Porcelli's conviction.

CONCLUSION

For the reasons stated above, Oscar Porcelli's petition for writs of habeas corpus and error coram nobis is denied.

The Clerk is directed to furnish a filed copy of the within to all parties.

SO ORDERED.
Dated: Brooklyn, New York

July 13, 2001

Charles P. Sifton

The People of the State of New York, Respondent, v. WilliamS. Nappo, William K. Nappo and John Rocco, Appellants, et al., Defendants.
No. 26

COURT OF APPEALS OF NEW YORK

94 N.Y.2d 564; 729 N.E.2d 698; 2000 N.Y. LEXIS 523; 708N.Y.S.2d 41

February 23, 2000, Argued April 13, 2000, Decided

Appeal, by permission of an Associate Judge of the Court of Appeals, from so much of an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered May 17, 1999, as modified an order of the Suffolk County Court (John V. Vaughn, J.), insofar as it granted a motion by defendants to dismiss counts one, two and three of the indictment. The modification consisted of deleting the provision of the order granting defendants' motion to dismiss counts two and three, substituting therefor a provision denying that portion of the motion, and reinstating counts two and three.

COUNSEL:

Mark L. Freyberg, New York City, Ronald P. Fischetti and Covington & Burling (Gerard E. Lynch of counsel), for William S. Nappo and another, appellants. Failure to pay taxes due on imported motor fuel does not constitute withholding of property from an "owner" and therefore fails to establish an essential element of larceny. ( *People v Manini, 79 NY2d 561; People v Zinke, 76 NY2d 8; People v Wilson, 93 NY2d 222;* People v Foster, 73 NY2d 596;*People v Yannett, 49 NY2d 296;*

*People v Jennings, 69 NY2d 103; People v Valenza, 60 NY2d 363.)*

Legal Aid Society, Riverhead (George Grun and Robert C. Mitchell of counsel), for John Rocco, appellant. The County Court properly dismissed the two counts of the indictment involving larceny, since by failing to pay taxes defendants were simply debtors of the State and had not converted any property to their own use which had ever belonged to the State of New York. ( *People v Valenza, 60 NY2d 363; People v Jennings, 69 NY2d 103; People v Yannett, 49 NY2d 296; People v Duda, 79 AD2d 712; People v Lyon, 82 AD2d 516; People v Felber, 264 App Div 181.)*

James M. Catterson, Jr., District Attorney of Suffolk County, Riverhead (Glenn Green of counsel), for respondent. Defendant's concealment of tax liability and wrongful withholding of the taxes due the State of New York established larceny in the first degree and thus supported the charge of conspiracy. ( *People v Levine, 167 AD2d 484, 77 NY2d 879; United States v Friedberg, 766 F Supp 87, 948 F2d 1277,* cert denied sub nom. *Teich v United States, 503 US 919; People v Garland, 69 NY2d 144; People ex rel. Short v Warden, 145 App Div 861, 206 NY 632; People v Capaldo, 151 Misc 2d 114; People v Izzo, 96 Misc 2d 634; People v Podolsky, 130 Misc 2d 987; Phelps v People, 72 NY 334; People v Ditta, 52 NY2d 657; People v Antilla, 77 NY2d 853.)*

JUDGES: Chief Judge Kaye and Judges Bellacosa, Levine, Ciparick, Wesley and Rosenblatt concur.

OPINION: [*566] [**699] Smith, J.

The issue here is whether defendants' failure to pay taxes on motor fuel imported from New Jersey to New York constitutes

larceny from New York State on the theory that New York was the owner of the unpaid taxes. We conclude that it does not.

In March 1997, defendants William S. Nappo, William K. Nappo and John Rocco were indicted, along with five additional individuals, and charged, in the first three counts, with enterprise corruption (Penal Law *§ 460.20*), conspiracy in the fourth degree (conspiring to commit grand larceny in the first degree) (Penal Law *§ 105.10* [1]) and grand larceny in the first degree (Penal Law *§ 155.42*), as well as a host of Tax Law offenses, including violation of Tax Law *§ 1812*. The full 12-count indictment alleged defendants' involvement in a scheme to import motor fuel from New Jersey to New York without filing reports or paying "motor fuel taxes" as required by the New York Tax Law.

County Court dismissed counts one, two and three of the indictment, with leave to resubmit the charges to another Grand Jury. On the People's appeal, the Appellate Division reinstated both the larceny and conspiracy charges, stating, "The Grand Jury evidence is sufficient to establish a prima facie case that [defendants] withheld property from its rightful owner, i.e., the State of New York, as defined by the [**700] Penal Law" *(261 AD2d 558, 559)*. A Judge of this Court granted defendants leave to appeal. We now reverse and dismiss the larceny and conspiracy charges.

The People contend that defendants were required to pay taxes on the importation and distribution of motor fuel in New York State and that their failure to do so constituted a larceny of property owned by the State of New York. Defendants counter that, as a matter of law, the State is not the "owner" of the uncollected taxes.

The State of New York is not an owner, as defined by the Penal Law, of taxes required to be paid for the importation and

distribution of motor fuel. The taxes due were not the property of the State prior to their remittance. Accordingly, defendants did not steal money that belonged to New York State, but rather failed to make payments of taxes which were their personal obligations under the Tax Law (see, *People v Zinke, 76 NY2d 8, 12).*

Our conclusion is supported both by the Penal Law and by our precedents. Penal Law *§ 155.05* (1) defines larceny as stealing [*567] property by taking, obtaining or withholding it from an owner thereof. An "owner" is defined as "any person who has a right to possession [of property] superior to that of the taker, obtainer or withholder" (Penal Law *§ 155.00* [5]).

In *People v Jennings (69 NY2d 103, 126-128),* we reversed a conviction for larceny when an insured retained insurance proceeds rather than distributing them to clients who had been victims of a warehouse robbery. We held that the clients were not the owners of the proceeds, and thus the defendant could not be convicted of larceny for failure to remit the proceeds to them. In *People v Yannett (49 NY2d 296),* this Court held that nursing home residents who had paid a higher private rate before a determination that they were eligible for a lower Medicare rate were not owners of the difference between the rates. Thus, the defendant nursing home operator was not liable for a larceny for failing to refund the difference (see also, *People v Wilson, 93 NY2d 222* [because a mall security guard had no ownership interest in stolen boots, the defendant could not be convicted of stealing boots from him]). Here, as in Jennings, Yannett and Wilson, defendants were not in possession, by trust or otherwise, of monies owned by the State.

The People's reliance on Tax Law *§ 1817* (k), which overruled the result in *People v Valenza (60 NY2d 363, 367),* is misplaced. In Valenza, we held that "[a] vendor who

collects sales taxes from customers, but fails to remit the sales taxes due the State under circumstances indicating an intent to permanently deprive the State of the taxes, may not be subjected to criminal prosecution for larceny by embezzlement."

While Tax Law *§ 1817* (k) now specifically authorizes prosecution under the Penal Law for failure to remit to the State sales taxes that have previously been collected from consumers, it does not follow that defendants may be prosecuted here for larceny or conspiracy. The People's position that failure to pay taxes due is equivalent to the failure to remit collected sales taxes is untenable. A seller who collects sales taxes holds money in trust for the State (Tax Law *§ 1817* [k]). Thus, the State may be deemed the "owner" of "collected" but unremitted sales taxes. Here, by contrast, defendants were obligated to pay motor fuel taxes upon the importation or distribution of motor fuel (see, Tax Law *§§ 284*, 284-a, 1102; *Herzog Bros. Trucking v State Tax Commn., 72 NY2d 720, 723),* but their tax liability did not depend upon the collection of taxes from consumers. Moreover, defendants did not hold any funds in trust for the State.

[*568] [**701] Accordingly, the order of the Appellate Division, insofar as appealed from, should be reversed and counts two (conspiracy in the fourth degree) and three (grand larceny in the first degree) of the indictment dismissed.

Chief Judge Kaye and Judges Bellacosa, Levine, Ciparick, Wesley and Rosenblatt concur.

Order, insofar as appealed from, reversed, etc.

UNITED STATES OF AMERICA, Appellee, v.
OSCAR PORCELLI,
Appellant

Nos. 87-1440, 87-1451
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

865 F.2d 1352; 1989 U.S. App. LEXIS 389

February 29, 1988, Argued
January 11, 1989, Decided

COUNSEL: VIVIAN SHEVITZ, New York, New York (Jane Simkin Smith, Steven A. Rosen, of counsel), for Appellant.

STEVEN GOLD, Assistant United States Attorney (Andrew J. Maloney, United States Attorney for the Eastern District of New York, Emily Berger, Assistant United States Attorney, of counsel), for Appellee.

JUDGES: Oakes and Newman, Circuit Judges, and Keenan, District Judge.*

* Of the United States District Court for the Southern District of New York, sitting by designation.

[*1355] OAKES, Circuit Judge:

Oscar Porcelli appeals a conviction on sixty-one counts of mail fraud, 18 U.S.C. @ 1341 (1982), and one count of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. @ 1962(c) (1982). These acts all relate to the filing of a series of--some one hundred--fraudulent New York State sales tax returns with respect to sales at twelve retail gasoline stations owned in whole or in part by Porcelli or one of his corporations. After a jury trial before Charles P. Sifton, Judge, in the United States District Court for the Eastern District of New York, resulting in the convictions, the

jury also returned a verdict of forfeiture of $ 4,755,000 representing the unpaid sales taxes as well as of thirty-four of Porcelli's corporations to the United States. Porcelli was sentenced to concurrent two-year terms on each of the sixty-two counts, with the execution of all but six months suspended, and was placed on probation for a period of five years. He was ordered to make restitution to the State of New York in the amount of $ 4,755,000 less any sums collected by the State pursuant to the judgment of forfeiture in this case or any civil tax proceeding. Following the forfeiture verdict, Judge Sifton entered a judgment of forfeiture which directs that Porcelli forfeit the sum of $ 4,755,000 and his interest in thirty-four corporations to the United States. The moneys or proceeds from the properties seized are to be paid to the State of New York up to the amount of all unpaid sales taxes, interest, and civil penalties and then to the United States up to an amount equal to twice the amount of sales tax and interest paid to the State of New York. Judge Sifton also denied Porcelli's motion for a new trial on grounds of ineffective assistance of counsel.

On appeal Porcelli argues that use of the mail fraud statute violated due process, that proof of mail fraud was legally insufficient in terms of proof as to specific criminal intent and in terms of proof as to "mailings"; that the mail fraud statute does not encompass tax violations; that the Government's use of RICO to prosecute Porcelli for state sales tax underpayments violates the intent of Congress; that the RICO conviction should be reversed because there was no evidence that the enterprise charged in the indictment was conducted through racketeering activity; that the forfeitures are supported by insufficient evidence and are tainted by erroneous instructions and ambiguous special interrogatories to the jury; that the forfeitures should be reversed because they are cruel, unusual, and grossly disproportionate to the misdeeds of the retail

gasoline companies involved; and that appellant was denied the effective assistance of counsel.

We think that the prosecution of a state sales tax evader for a RICO violation pushes that law to its outer limits, especially when that tax evasion was not made criminal by the state itself at the time that the fraudulent returns were filed. We nevertheless affirm the convictions (except for six counts involving only the mailing of blank forms by the State to Porcelli's companies) by virtue of the extraordinarily broad sweep of RICO and of the federal mail fraud statute and despite McNally v. [*1356] United States, 483 U.S. 350, 55 U.S.L.W. 5011, 97 L. Ed. 2d 292, 107 S. Ct. 2875 (U.S. June 24, 1987). We believe, however, following United States v. Horak, 833 F.2d 1235 (7th Cir. 1987), that the forfeitures were overly broad because they included corporations as to which the Government did not prove any direct receipts from the fraudulent gas station corporations, and we think that the trial judge must reconsider the defendant's claim that the forfeitures were disproportionate. We do not think that Porcelli satisfies either prong of the test of ineffective counsel under Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Therefore we affirm the convictions and the denial of a new trial, but we reverse the order relating to forfeiture and remand for further findings.

FACTS

Viewing the evidence most favorably to the Government, twelve of defendant's retail gasoline stations filed false sales tax returns between 1978 and 1982, enabling them to omit to pay approximately $ 4,755,000 in state sales tax. This represented two-thirds of the $ 6.7 million in taxes the stations owed on sales during that period.

Porcelli first entered the retail gasoline business in 1973 in partnership with one Jimmy Garcias Sorentino. From then to 1979, the two men purchased and operated a chain of retail service stations which by 1979 had grown to fourteen in number. As of June 1, 1979, they terminated their partnership and each continued to operate seven of the stations. Each retail gasoline station was organized as a separate corporation, and we will call them the operating corporations. The real estate underlying each station was separately held by what we will call the realty corporations. Porcelli formed a new management company, Ditmas Oil Associates, Inc. ("Ditmas"). Ditmas was the parent company of the group. It had a gasoline terminal which was used to supply gasoline to the various retail outlets. Porcelli also formed a trucking company called Chamber Transport, which made deliveries from the Ditmas terminal to the various retail stations, and a security company known as MK Armored Services, which picked up the sales proceeds at the retail stations and brought them to Porcelli's central money room at Ditmas.

In 1982 Porcelli consolidated his holdings, which had increased to seventeen, into two corporations, Gaseteria Oil Corporation, Inc., and Bosbay Service Center, Inc., and ultimately into the one, Gaseteria.

There was testimony, which is supported by New York statutory authority, that retailers must register with the State and obtain a certificate of authority to collect sales taxes, and that the State mails blank sales tax returns to all registered retailers at the beginning of every sales tax quarter. The returns, setting forth the total dollar amount of quarterly sales and the sales taxes due on that amount, are required to be filed by Article 29 of the New York Tax Law (McKinney 1987).

We will return to the New York sales tax law as it pertains to petroleum products in our discussion of McNally v. United

States. Suffice it to say here that Count One of the indictment lists 143 racketeering acts, numbered 1(a) through 26(h). Some of the racketeering acts involve two mailings -- one of a blank return by the State to one of Porcelli's corporations and the second of a fraudulently completed return by a Porcelli corporation to the State. A number of racketeering acts charged relate only to the second type of mailing, and six acts charged cover only the first. The parties stipulated that each of the 143 sales tax returns was mailed as described in the indictment.

A state sales tax auditor, James McGill, audited the tax returns listed in the indictment. He obtained sales data from Porcelli's suppliers reflecting the dollar value of the gasoline they provided to Porcelli's terminal or retail stations and compared that data to the sales declared by Porcelli on the tax returns. In making this comparison, McGill assumed that Porcelli sold gasoline at the same price he paid for it, thus realizing no profits at all. The parties stipulated that the gas stations did in fact sell all [*1357] gasoline at a price equal to or greater than that at which it was purchased.

McGill's audit determined that during the last year of Porcelli's partnership with Garcia his corporations reported approximately $ 3,580,000 in sales, or only 26% of their true sales for the year. This resulted in an underpayment of sales taxes due the State of New York of some $ 798,000. During the three and a half years following the termination of the partnership with Garcia, i.e., from June of 1979 through 1982, Porcelli's businesses had sales of $ 69,600,000 but reported only $ 20,330,000, thereby underpaying taxes due New York State by $ 3,957,000. Thus the total amount of Porcelli's underpayments was the $ 4,755,000 previously stated.

At trial Porcelli's accountant, Murray Katz, who prepared most of the tax returns, made it clear that he did so with

Porcelli's knowledge and at his urging. He related the conversation he had with Porcelli in 1979 when he realized that the oil companies supplying Porcelli generated printed summaries of their sales which, if revealed to the State tax authorities, would reveal the Porcelli operating companies' fraud. Porcelli told Katz not to worry because the State tax authorities would never obtain supplier records and compare them to his companies' returns. After Porcelli and Garcia split up, Porcelli and Katz discussed consolidating the Porcelli holdings into one corporation. They decided against doing so because they believed that a single sales tax return for all of the gas stations was more likely to be audited than individual returns filed for each station. In September 1979, Katz attempted to prepare, he testified, an accurate set of sales tax returns; when Porcelli saw the figures he told Katz that it would be impossible for him to stay in business and grow without understating his sales tax liabilities.

While Katz was working for Porcelli, Mobil Oil sued three of the operating companies and sought copies of their sales tax returns in civil discovery. Porcelli directed Katz to prepare a set of dummy tax returns setting forth the true sales volume of the operating companies, and Katz did so. The dummy returns showed substantially greater sales than the amounts shown on the returns actually filed.

There was further evidence of Porcelli's involvement in the tax fraud: He received daily sales reports concerning each station, he set the prices charged for gasoline, and he had monthly summaries of sales in gallons and dollars which were kept in his office, as well as weekly statements of cash balances in corporate bank accounts. He had previously admitted that he had total control over his business, "purchasing, selling, decision making, building, firing, hiring, everything," claiming that he did not delegate authority to, or share decision-making responsibilities with, anyone. When the

State started an audit of one of Porcelli's retail stations, "Gasaver," Porcelli, according to Katz, insisted on preparing its returns himself and did so.

By January of 1982, Porcelli had received notices from state authorities that he owed millions of dollars in back sales taxes plus interest and penalties, but he continued to employ and rely upon Katz. Indeed, according to Katz, Porcelli offered him a $ 200,000 bribe to plead guilty to filing false returns, accept sole responsibility for the sales tax frauds, and falsely exculpate Porcelli. We will discuss further evidence pertaining to Porcelli's RICO enterprise under that topic.

## DISCUSSION

### A. Due Process

Porcelli's first argument is that because the State of New York itself did not punish criminally the failure of a vendor to pay over to the State sales taxes collected from a customer, use of the federal mail fraud statute to do so violated due process of the law. Porcelli is correct as far as New York law is concerned. In People v. Valenza, 60 N.Y.2d 363, 457 N.E.2d 748, 469 N.Y.S.2d 642 (1983), the Court of Appeals examined the structure of the "[p]enalties and interest" provision, section 1145, of the Tax Law. Certain violations were subject to both criminal and civil penalties, while others, including the failure to remit sales taxes, were subject to civil penalties [*1358] only (with one small exception not relevant here). The court therefore held that "the failure to pay over sales taxes may not be considered criminal conduct and is subject to civil penalties only." 60 N.Y.2d at 370, 457 N.E.2d at 750, 469 N.Y.S.2d at 645.

The overall argument that Porcelli had no notice that his conduct was illegal is nevertheless unavailing in light of United States v. DeFiore, 720 F.2d 757 (2d Cir. 1983), cert. denied,

467 U.S. 1241, 104 S. Ct. 3511, 82 L. Ed. 2d 820 (1984). The defendant there argued that the wire fraud statute should not apply to schemes to defraud the state governments of taxes due. This court followed four other circuits that had squarely applied the federal fraud statutes to state tax law violations. We held that the federal wire fraud statute was applicable to a scheme to defraud the State of New York of cigarette taxes. The court said that the focus of the wire fraud statute "is upon the misuse of the wires, not the regulation of state affairs. In short, principles of federalism do not provide a basis for reversal." Id. at 761-62 (citations omitted). In so holding, the court distinguished Judge Weinfeld's decision in United States v. Henderson, 386 F. Supp. 1048, 1052 (S.D.N.Y. 1974), which held that Congress did not intend to apply the mail fraud statute to a scheme to defraud the United States by evading the payment of taxes. DeFiore distinguished Henderson as involving a federal income tax fraud prosecution and also cited United States v. Miller, 545 F.2d 1204, 1216 n.17 (9th Cir. 1976), cert. denied, 430 U.S. 930, 51 L. Ed. 2d 774, 97 S. Ct. 1549 (1977), which rejected Henderson in the context of a federal tax violation. DeFiore, 720 F.2d at 761.

To be sure, neither Defiore nor the cases from the other circuits, United States v. Melvin, 544 F.2d 767 (5th Cir.), cert. denied, 430 U.S. 910, 51 L. Ed. 2d 587, 97 S. Ct. 1184 (1977); United States v. Brewer, 528 F.2d 492 (4th Cir. 1975); United States v. Mirabile, 503 F.2d 1065 (8th Cir. 1974), cert. denied, 420 U.S. 973, 43 L. Ed. 2d 653, 95 S. Ct. 1395 (1975); and United States v. Flaxman, 495 F.2d 344 (7th Cir.), cert. denied, 419 U.S. 1031, 42 L. Ed. 2d 306, 95 S. Ct. 512 (1974), considered the argument that a state's failure to make underpayment of taxes criminal should bar federal prosecution. That does not mean, however, that the broad federal mail fraud statute does not apply, since it punishes "any scheme or artifice to defraud" in which the jurisdictional means--the mails--are employed.

Porcelli casts his due process argument in a slightly different way, focusing on the mental element of the offense. He begins with the rule of lenity, that "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" Liparota v. United States, 471 U.S. 419, 427, 85 L. Ed. 2d 434, 105 S. Ct. 2084 (1985) (quoting Rewis v. United States, 401 U.S. 808, 812, 28 L. Ed. 2d 493, 91 S. Ct. 1056 (1971)). Porcelli refers us to James v. United States, 366 U.S. 213, 221-22, 6 L. Ed. 2d 246, 81 S. Ct. 1052 (1961), in which the Court reversed a tax evasion conviction for lack of proof of willfulness because the defendant's conduct, according to the contemporaneous judicial gloss, had been proper when it occurred. The argument is that given the "gloss" of the New York sales tax law during the indictment period, Porcelli could not, "in legal contemplation, have formed the intent necessary to commit" fraud. Kahr v. Commissioner, 414 F.2d 621, 627 (2d Cir. 1969); see also United States v. Dixon, 536 F.2d 1388, 1401 (2d Cir. 1976) ( mail fraud requires specific intent). He also interprets his comments to Katz, that in effect the underpayment was a "loan" from the State, as meaning that he could not have thereby had the specific intent.

The specific intent required under the mail fraud statute is the intent to defraud, e.g., United States v. Rodolitz, 786 F.2d 77, 80-81 (2d Cir.), cert. denied, 479 U.S. 826, 93 L. Ed. 2d 52, 107 S. Ct. 102 (1986), and not the intent to violate a statute. Porcelli intended to defraud the State. We read Katz's testimony as showing that Porcelli knew full well that he was not simply "borrowing" money from the State. Accordingly, we reject this due process claim.

[*1359] B. Mailings by the State

Six of the sixty-one counts of mail fraud charged only a mailing of a blank sales tax return from New York State to

Porcelli, without the return mailing of a fraudulent return. Porcelli argues that these mailings by the State were not in furtherance of his so-called fraudulent scheme and that those six counts somehow tainted his entire trial. We agree with the first argument, but not with the second. True, this court has gone quite far in holding that routine mailings are sufficient to form the basis for mail fraud convictions. E.g., United States v. Muni, 668 F.2d 87, 90 (2d Cir. 1981); United States v. Reed, 639 F.2d 896, 906 (2d Cir. 1981). Under Pereira v. United States, 347 U.S. 1, 8, 98 L. Ed. 435, 74 S. Ct. 358 (1954), use of the mails need not be an essential element of the scheme; rather, mailings are in furtherance of a fraudulent scheme if they are "incident to an essential part of the scheme." Cf. United States v. Maze, 414 U.S. 395, 38 L. Ed. 2d 603, 94 S. Ct. 645 (1974) (finding use of mails not sufficiently closely related to respondent's scheme to support mail fraud conviction).

The use of forms mailed by the State was a necessary part of Porcelli's scheme. However, the mailing of a form by the State, and nothing more, is not sufficiently closely related to his scheme to support a separate mail fraud count. United States v. Freitag, 768 F.2d 240 (8th Cir. 1985), and United States v. Bosby, 675 F.2d 1174 (11th Cir. 1982), are distinguishable in that they involved personalized checks that the defendants caused to be mailed and that were essential [**16] to their schemes. Thus we reverse as to mail fraud counts 2, 13, 18, 24, 40, and 51 corresponding to Rackeetering Acts 15(f), 16(f), 18(f), 19(f), 21(f), and 24(d).

These reversals do not disturb Porcelli's other convictions. It was not prejudicial to include the mailings by the State in the other counts where there were returned fraudulent mailings. We perceive no prejudicial spillover from the inclusion of the six racketeering acts as to which we reverse or from those mail fraud counts themselves. See United States v. Cody, 722 F.2d

1052, 1060-61 (2d Cir. 1983), cert. denied, 467 U.S. 1226, 81 L. Ed. 2d 873, 104 S. Ct. 2678 (1984); United States v. Ivic, 700 F.2d 51, 65 2d Cir. 1983).

C. McNally

Porcelli's next argument is more persuasive. He asserts that the Supreme Court in McNally v. United States, 483 U.S. 350, 55 U.S.L.W. 5011, 97 L. Ed. 2d 292, 107 S. Ct. 2875 (U.S. June 24, 1987), indicated that Congress did not intend the mail fraud statute to apply to the tax violations here. McNally, it will be recalled, held that the mail fraud statute, 18 U.S.C. @ 1341 (1982), is limited to the protection of property rights and that the citizen's right to honest government is not such a property right. It follows, then, that the statute protects [**17] only a state's interest as "property holder." 55 U.S.L.W. at 5014 n.8. Moreover, the Court said that "if state law expressly permitted or did not forbid [the conduct] it would take a much clearer indication than the mail fraud statute evidences to convince us that [the conduct] defrauds the State and is forbidden under federal law." Id. at 5015
n.9. The argument achieves an even greater level of sophistication when one recalls the words of McNally:

As the Court long ago stated, however, the words "to defraud" commonly refer to "wrongdoing one in his property rights by dishonest methods or schemes" and "usually signify the deprivation of something of value by trick, deceit, chicane, or overreaching."

55 U.S.L.W. at 5014 (emphasis added) (quoting Hammerschmidt v. United States, 265 U.S. 182, 188, 68 L. Ed. 968, 44 S. Ct. 511 (1924)). The concept of deprivation means obtaining property with an intent not to pay as opposed to mere failure to pay. The question then becomes whether Porcelli intended to deprive New York of its property.

Intangible interests have long been recognized and protected as property. E.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 81 L. Ed. 2d 815, 104 S. Ct. 2862 [*1360] (1984) (trade secrets); United States v. General Motors Corp., 323 U.S. 373, 89 L. Ed. 311, 65 S. Ct. 357 (1945) (long term lease). Any suggestion that McNally might exclude all intangible interest from the scope of section 1341 (or its wire fraud companion, section 1343) was dispelled by Carpenter v. United States, 484 U.S. 19, 56 U.S.L.W. 4007, 98 L. Ed. 2d 275, 108 S. Ct. 316 (U.S. Nov. 16, 1987) (holding that confidential business information is "property" protected by the mail and wire fraud statutes). Thus the fact that New York's interest in unpaid sales taxes is intangible is no obstacle to a mail fraud prosecution. In fact, Porcelli, as he knew he was doing, obtained cash, and this is true whether or not he actually collected the sales tax on his gasoline sales. If he did not collect the tax, then he obtained funds that an honest retailer, selling for the same price, would have remitted to the State. If he did collect the tax (as would have been proven if there had been evidence that it was posted on signs) but failed to remit, then, of course, he obtained money and surely deprived the State. In any event, New York State lost money as a result of Porcelli's schemes, that is to say, lost the sales tax proceeds due from his sales of gasoline even though it maintains a civil right, or chose in action, to obtain those proceeds. n1

----------Footnotes----------

n1 The dissent characterizes Porcelli's behavior in purely negative terms: He failed to collect the sales taxes, and then he simply failed to pay a debt. We see more than just omissions to act in this case. There is a pattern of action stretching over a considerable period of time. Porcelli systematically underpaid his sales taxes and concealed what he was doing. A vendor may undertake to defraud the State by failing to collect sales

taxes and then pocketing the money that he owes in taxes. This is quite different from "simply . . . failing to pay [a] debt."

----------End Footnotes----------

Under McNally, then, Porcelli gained something tangible and New York State's interests as a property holder were implicated. But did Porcelli deprive New York of its property? The answer to this question would be easy if Porcelli actually collected the tax on his sales. See N.Y. Tax Law @ 1132(a) (McKinney 1987) ("tax shall be paid to the person required to collect it as trustee for and on account of the state"). However, the Government did not prove actual collection of the tax. We turn to New York law to determine whether a vendor's failure both to collect and to remit sales taxes deprives the State of its property.

One derives from the New York case law that sales taxes are just that--a tax obligation--and not ordinary debt. The case law also indicates that the statutory provisions for proceedings to recover unpaid sales taxes define the State's property interest here as choses in action. In In re Rockaway Paint Centre, Inc., 249 A.D. 66, 291 N.Y.S. 341 (1936), the court in reference to the New York City sales tax there involved said that "the tax is imposed not on the vendor or the purchaser, but 'upon receipt from sales.'" 249 A.D. at 68, 291 N.Y.S. at 344 (quoting local tax law). Here also the sales tax is imposed upon "[t]he receipts from every retail sale of tangible personal property." N.Y. Tax Law @ 1105(a) (McKinney 1987). The Rockaway court went on to say:

True, the obligation to pay the tax is placed in the first instance upon the purchaser, but a concurrent obligation is placed upon the vendor to collect it, and, whether he does or does not collect it, a direct and independent obligation is cast upon the

vendor to pay it to the city. Once the purchaser pays the tax, whether to the vendor or directly to the city, he [**21] is discharged from liability. But until the receipt of the tax by the city, the vendor remains liable for it. The fact that in the event of non-payment the city has a right to proceed against the purchaser does not diminish the liability of the vendor or change the character of his obligation from that of a tax to a debt.

249 A.D. at 68-69, 291 N.Y.S. at 344. So, too, did Porcelli have "a direct and independent obligation" to pay the State the sales taxes due, an obligation which by virtue of his fraudulent scheme the State did not even know about.

Further, the New York tax law here involved states that "[e]very person required to collect the tax shall collect the [*1361] tax from the customer when collecting the price . . . to which it applies. . . . The tax shall be paid to the person required to collect it as trustee for and on account of the state." N.Y. Tax Law @ 1132(a) (McKinney 1987). It also provides that the "amount so payable to the tax commission for the period for which a return is required to be filed shall be due and payable to the tax commission on the date limited for the filing of the return for such period, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of receipts . . . or the value of property or services sold or purchased or the taxes due thereon." Id. @ 1137(e)(1). In reference to the analogous New York City sales tax law which declared that the tax "shall be paid by the purchaser to the vendor as trustee for and on account of the city and the vendor shall be liable for the collection thereof and for the tax," the New York Court of Appeals held that

[w]hile the incidence of the tax is, in the first instance, placed on the consumer, this court has flatly held that "vendors . . . are to be deemed taxpayers under this legislation," Fifth Ave. Building Co. v. Joseph, 297 N.Y. 278, 283, 79 N.E.2d 22, 24,

that "the obligation imposed upon the vendor is in the nature of a tax" which is "not measured by the amount collected nor dependent upon failure to exercise the diligence in collection which would be required of an agent." Matter of Atlas Television Co., 273 N.Y. 51, 57-58, 6 N.E.2d 94, 96.

W. T. Grant Co. v. Joseph, 2 N.Y.2d 196, 203, 140 N.E.2d 244, 247-48, 159 N.Y.S.2d 150, 154 (1957). The W. T. Grant Co., court stated that it was a "necessary corollary that one measure of the vendor's obligation as a taxpayer is the tax which his customers were required to pay on individual sales, and that obligation may not be discharged by payment of any lesser amount, irrespective of the vendor's exercise of reasonable diligence in collection." 2 N.Y.2d at 203, 140 N.E.2d at 248, 159 N.Y.S.2d at 154. The court then went on to quote Merchants Refrigerating Co. v. Taylor, 275 N.Y. 113, 124, 9 N.E.2d 799, 803 (1937), for the proposition that the vendor is "'under a duty to pay the tax . . . regardless of whether or not . . . [he] collects it from the purchaser.'" 2 N.Y.2d at 203, 140 N.E.2d at 248, 159 N.Y.S.2d at 154-55.

We do not think that Porcelli was in any different situation vis-a-vis the State here. He was obliged to pay the tax whether or not he collected it from the customers. By virtue of his scheme to defraud, i.e., the false sales tax returns, he was in a very real sense "depriving" the State of its property. The fact that the State has a claim, a chose in action, for the difference between what was paid and the tax shown on the false return may mean that it has not finally been deprived of that chose in action. However, the fact remains that until the fraud was discovered it had been deprived of its property.

Porcelli's conduct, in short, was aimed at depriving the State of its property, the choses in action represented generally in the state tax law as above stated, and specifically in the state tax law providing for an action at law and authorizing the tax

commissioner to issue a warrant and to obtain a lien upon the property of the person failing to pay the tax. N.Y. Tax Law @ 1141(a)-(b) (McKinney 1987). n2

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n2 This is not, as suggested by the dissent, an alternative theory upon which to uphold Porcelli's conviction. Our analysis shows, first, that New York had a property interest, which we label a chose in action, in Porcelli's tax obligations. We then show that Porcelli deprived New York of that property when he carried out a scheme (in the words of the indictment and the jury charge) "to defraud the State of New York . . . of sales tax due on the retail sale of gasoline by underreporting the gross sales, taxable sales, and sales tax due."
Thus, Porcelli's indictment and the charge to his jury remain satisfactory; they required proof that he knowingly and willfully defrauded the State of money due from sales taxes. Proof of that was proof that he intentionally deprived the State of its property, in violation of the mail fraud statute as construed by McNally.

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Nothing in United States v. Holzer, 840 F.2d 1343 (7th Cir. 1988), is to the contrary. There, Judge Posner's opinion followed [*1362] McNally and distinguished Carpenter in reversing the mail fraud conviction of an Illinois state trial judge for taking bribes from lawyers with cases before him or from persons who sought appointment as receivers. Indeed, in dictum Judge Posner advances very much the same proposition we rely upon here: McNally would not apply to a corrupt public official who, having received bribes, takes steps to conceal them in order to defeat his public employer's right to

obtain them by means of a suit based on constructive trust principles. See Holzer, 840 F.2d at 1348.

D. Enterprise

Porcelli argues that the evidence at trial did not prove the extensive enterprise alleged in the indictment. The failure to satisfy United States v. Huber, 603 F.2d 387 (2d Cir. 1979), cert. denied, 445 U.S. 927, 63 L. Ed. 2d 759, 100 S. Ct. 1312 (1980), and the material variance between the indictment and the proof require, he claims, a reversal of the RICO conviction.

The "enterprise" is a separate element that must be proven in a RICO action. United States v. Turkette, 452 U.S. 576, 583, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981). The statute defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. @ 1961(4) (1982). This broad definition makes sense when applied to uses of the word in subsections 1962(a) and (b). The enterprise can be any enterprise, not necessarily one engaged in a pattern of racketeering; indeed, it may be a victim of racketeering. This is consistent with Congress's goal of protecting legitimate businesses from infiltration by organized crime. See Lynch, RICO: The Crime of Being a Criminal, 87 Colum. L. Rev. 661, 677-80 (1987).

In some situations, however, the "enterprise" is more narrowly defined. The enterprise itself may be the villain, conducting its affairs through a pattern of racketeering. This sort of enterprise falls within the scope of subsection 1962(c). See Turkette, supra (term "enterprise" as used in RICO encompasses both legitimate and illegitimate enterprises).

Differences among RICO enterprises are apparent in the case law, although courts do not always articulate the distinction.

For example, in United States v. Zang, 703 F.2d 1186, 1194 (10th Cir. 1982), cert. denied, 464 U.S. 828, 104 S. Ct. 103, 78 L. Ed. 2d 107 (1983), an "ongoing association for the purpose of engaging in interstate commerce" satisfied RICO's "enterprise" element. The enterprise in this case was a partnership between the two racketeer defendants. However, as the court's treatment of the forfeiture issue demonstrated, the affairs of that enterprise were not conducted through a pattern of racketeering. See id. at 1195. In United States v. McNary, 620 F.2d 621, 628-29 (7th Cir. 1980), the court upheld a conviction under section 1962(a) where the defendant had invested money obtained through bribery and extortion in a family-owned travel agency, an enterprise engaged in interstate commerce.

In many cases, of course, the enterprise itself is the vehicle for the racketeering activity. For example, in Huber an interlocking group of corporations constituted a fraudulent enterprise that supplied hospital and surgical equipment. 603 F.2d at 393-95. In United States v. Mazzei, 700 F.2d 85, 91 (2d Cir.), cert. denied, 461 U.S. 945, 77 L. Ed. 2d 1304, 103 S. Ct. 2124 (1983), the enterprise was a group of players and bettors who joined together to influence the outcome of college basketball games in a point-shaving scheme.

These distinctions among RICO enterprises become important in case of forfeiture under section 1963(a). Courts that hold that a "RICO enterprise" is forfeitable in its entirety refer to enterprises whose affairs are conducted through a pattern of racketeering, in violation of section 1962(c). E.g., United States v. Walsh, 700 F.2d 846 (2d Cir.), cert. denied, 464 U.S. 825, 78 L. Ed. 2d 102, 104 S. Ct. 96 (1983); Huber. The statute also requires the forfeiture of an "interest" outside the racketeering RICO enterprise--e.g., an investment in a [*1363] legitimate business made with tainted funds or an interest that gives one influence over a racketeering enterprise.

18 U.S.C. @ 1963(a)(1), (2)(D), (3) (Supp. IV 1986). See Russello v. United States, 464 U.S. 16, 78 L. Ed. 2d 17, 104 S. Ct. 296 (1983) (discussion of section 1963(a)(1)). In these cases, however, it is not the entire enterprise that is forfeited but the property interests in that enterprise that are derived from racketeering activity or that are a source of influence over a racketeering enterprise. Courts therefore limit forfeitures outside the racketeering enterprise. E.g., Zang, 703 F.2d at 1195; Horak, 833 F.2d at 1243 [**29] (forfeiture under @ 1963(a)(1) limited to interests that would not have been acquired or maintained "but for" defendant's racketeering activities); cf. United States v. McKeithen, 822 F.2d 310, 314-15 (2d Cir. 1987) (requiring proportional forfeiture of property that is source of influence under Continuing Criminal Enterprise statute, 21 U.S.C. @ 848(a)(2), and noting similarity of continuing criminal enterprise statute's forfeiture provision to @ 1963(a)(2)).

These distinctions should be borne in mind when we refer to the term "enterprise." For clarity here, we refer to a "RICO enterprise" to mean a racketeering enterprise within the meaning of section 1962(c). An important issue in this case is the extent of Porcelli's RICO enterprise. There can be no serious dispute that the twelve operating companies were, collectively, a RICO 0enterprise. But what about the realty companies? What about Ditmas, the management company? What about the trucking and security companies?

The Supreme Court has commented that an enterprise may be "a group of persons associated together for a common purpose of engaging in a course of conduct." The existence of the enterprise may be proven with evidence of an "ongoing organization" in which its associates "function as a continuing unit." Turkette, 452 U.S. at 583. See also United States v. Lemm, 680 F.2d 1193, 1198 (8th Cir. 1982) (elements of "enterprise" are "common or shared purpose," "continuity of

structure and personnel," and "ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering"), cert. denied, 459 U.S. 1110, 74 L. Ed. 2d 960, 103 S. Ct. 739 (1983); GLM Corp. v. Klein, 665 F. Supp. 283, 289 (S.D.N.Y. 1987) (complaint sufficiently alleged RICO enterprise where it claimed that individuals "functioned as a continuing group with a common purpose to divert corporate opportunities . . . by improper means").

This court's decision in Huber shows the correct approach to defining the RICO enterprise in Porcelli's case. Huber involved a multicorporate hospital supply business which had defrauded the United States through Medicare, Medicaid, and Hill-Burton hospital programs. Huber owned seven corporations, all of which were in the business of supplying hospital and surgical supplies, furniture, and equipment. Id. at 390-92. The court held that common ownership of the corporations was, in itself, an insufficient association to create a RICO enterprise. Id. at 394. However, the evidence showed that transfers of funds among Huber's companies could "represent[] funds derived from the scheme to defraud." Each of the companies was involved in the fraudulent hospital supply operation; they were not "merely unrelated businesses owned by the same person." The court concluded that Huber's seven corporations were "a single business operated under various names and forms chosen by appellant to suit his own purposes and convenience." Id. at 395. They were the RICO enterprise that was subject to forfeiture. Id. at 390-91.

The Huber court distinguished United States v. Nerone, 563 F.2d 836 (7th Cir. 1977), cert. denied, 435 U.S. 951, 98 S. Ct. 1577, 55 L. Ed. 2d 801 (1978), where an illegal gambling operation in one mobile home had "nothing to do with the affairs of the trailer park" where that home was located. Huber, 603 F.2d at 395. The count also warned against "undue prosecutorial zeal in invoking RICO." Id. at 396. See also

Horak, 833 F.2d at 1251 ("prosecutorial caprice in the choice of the enterprise" could implicate the Eighth Amendment).

[*1364] The evidence in Porcelli's case shows the existence of a RICO enterprise extending beyond the twelve operating companies that underpaid their sales taxes. Those operating companies occupied land that was owned or leased by separate realty companies. Without that real estate, obviously, the operating companies could not have operated. In addition, Ditmas was the keystone in Porcelli's racketeering arch. There was evidence that Ditmas was the parent of the retail gas stations. Porcelli, his accountant, and his management staff had offices at Ditmas where they kept the books and records of the operating companies. Ditmas also operated a wholesale gasoline terminal which supplied the retail stations with gasoline. By channeling all of his wholesale purchases through Ditmas, Porcelli could conceal the volume of sales at individual stations and thus the extent of his underpayment of sales taxes.

We conclude, therefore, that the evidence is sufficient to prove a RICO enterprise consisting of the twelve operating companies that underpaid their sales taxes, the realty companies that owned or leased those operating companies' land and Ditmas Oil Associates, Inc., the management company. It was incorrect, however, to include in the RICO enterprise four other operating companies that were acquired with funds from the twelve operating companies but that did not underpay their sales taxes. Those four companies might well be forfeitable, in whole or in part, but they are not part of Porcelli's RICO enterprise. Nor should realty companies that did not have offending companies on their land be included in the RICO enterprise. Similarly, the trucking and security companies were not part of Porcelli's RICO enterprise. They provided services to the offending retail gasoline companies; but, unlike the realty companies or the management company,

they were not an integral part of Porcelli's fraudulent scheme.

The variance between the charged enterprise and the proof did not prejudice Porcelli and does not warrant reversal of his RICO conviction. Porcelli's defense to the RICO charge against all of the corporations specified in the indictment necessarily included his defense against an identical RICO charge against the twelve offending operating companies, the realty companies, and the management company. See United States v. Ianniello, 808 F.2d 184, 189 (2d Cir. 1986), cert. denied, 483 U.S. 1006, 107 S. Ct. 3229, 97 L. Ed. 2d 736 (1987); United States v. Heimann, 705 F.2d 662, 666-68 (2d Cir. 1983), cert. denied, 466 U.S. 962, 80 L. Ed. 2d 560, 104 S. Ct. 2178 (1984); United States v. Sindona, 636 F.2d 792, 798-99 (2d Cir. 1980), cert. denied, 451 U.S. 912, 68 L. Ed. 2d 302, 101 S. Ct. 1984 (1981).

E. Forfeiture

The jury found $ 4,755,000 and thirty-four separate corporations forfeitable to the federal government. On the basis of these findings, the district judge declared the moneys and properties forfeited to the United States with the limitations previously indicated. The thirty-four forfeited corporations included the twelve offending gasoline retail companies, as well as Ditmas Oil Associates, Inc., several realty corporations, the MK Armored Services Corporation, and Chamber Transport, Inc. Among the realty corporations, some owned the land on which gasoline station operators were located and some did not; some owned land both of offending and nonoffending retail corporations.

Porcelli challenges this forfeiture on a number of grounds--statutory, evidentiary, equitable, proportional, and constitutional.

A RICO enterprise found in violation of section 1962(c) is indivisible and is forfeitable in its entirety. United States v. Anderson, 782 F.2d 908, 917-18 (11th Cir. 1986); Walsh, 700 F.2d at 857; Huber, 603 F.2d at 397; see @ 1963(a)(2)(A)-(C). The Eighth Amendment may limit the forfeiture where the enterprise is "substantially engaged in legitimate business." Walsh, 700 F.2d at 857.

In addition to forfeiting the RICO enterprise, the convicted racketeer must forfeit certain property interests outside the RICO enterprise. These include an "interest" acquired or maintained through a pattern of racketeering activity. @ 1963(a)(1). The [*1365] racketeer also forfeits any property or contractual rights that give him influence over the RICO enterprise. @ 1963(a)(2)(D). And, as noted above, these forfeitures are subject to limitations. See Horak, 833 F.2d at 1243 ("but for" test); cf. McKeithen, 822 F.2d at 315 (proportionality under analogous forfeiture provision of CCE). The Congressional aim guiding these forfeitures is to recover all of the racketeer's ill-gotten gains but not to seize legitimately acquired property.

Porcelli must forfeit his RICO enterprise. If the enterprise had been too broadly defined, he could legitimately challenge this forfeiture. However, the enterprise as we have defined it was deeply implicated in Porcelli's fraudulent scheme. The judgment forfeiting the twelve operating companies, the realty companies associated with those companies, and Ditmas Oil Associates is therefore appropriate under section 1963(a)(2)(A).

In addition, Porcelli must forfeit certain interests outside his RICO enterprise. There is evidence of substantial transfers of money between Porcelli's various corporations. Porcelli portrays these as no more than arm's-length business dealings--the payment of rent, purchases of supplies, etc. They

are, in fact, more than that. Funds derived from the operation of the RICO enterprise were proceeds obtained from racketeering activities. When Porcelli used his tainted profits to buy new properties, he acquired interests that were forfeitable under section 1963(a)(1). See Russello, 464 U.S. at 22 (proceeds of fraud forfeitable).

Through the testimony of Katz and with documentary evidence, the Government proved that money from Porcelli's operating companies helped to finance his expansion. Frequently, funds were channeled through Ditmas, the management company; sometimes, money from the operating companies went directly to the realty companies that purchased new properties. The evidence showed that the following properties were acquired by means of extraordinary payments from the operating companies:

1. property on Coney Island

2. the Claudan Auto Center

3. the Terraneous gas station

4. the Ditmas oil terminal

5. Chambers Transport, Inc.

6. property at 2910 Northern Boulevard in Queens

7. property at 1153 Atlantic Avenue in Brooklyn

8. property at 15409 Union Turnpike

9. property at 2 West End Avenue

These properties are hence forfeitable under section 1963(a)(1) to the extent of the contribution from the offending companies, but not necessarily in their entirety. See Horak, 833 F.2d at 1241-44; Zang, 703 F.2d at 1195. There is also evidence that Porcelli's business expanded and prospered as a result of his hard work and business acumen. In other words, these properties are not entirely the tainted fruits of Porcelli's fraud. The court below erred in not determining the extent of Porcelli's interest in these properties that he would not have acquired or maintained but for his fraudulent scheme. See Horak, supra. Similarly, forfeiture under section 1963(a)(2)(D) (regarding sources of influence over the RICO enterprise) must be limited by McKeithen's rule of proportionality. This is a matter for reconsideration by the district court on remand.

Porcelli makes numerous other arguments as to the impropriety of the forfeiture, but we believe that they are without merit. As to the cash forfeiture verdict, he claims that instead of multiplying the value of the gasoline sold by the sales tax rate of 8%, as the Government expert, the New York state tax auditor, testified, the jury should have divided it by 1.08. But the expert started from wholesale prices which did not include sales taxes and multiplied those prices by 8% to calculate the amount of sales tax a retailer should have added to his wholesale prices. This was in accord with the New York case of W. T. Grant Co. v. Joseph, 2 N.Y.2d at 204, 140 N.E.2d at 248, 159 N.Y.S.2d at 144 (vendor is "liable . . . for the taxes which should have been [*1366] paid by his purchasers (or the amount of taxes actually collected, if that be greater)").

Porcelli's next argument is that if there were proceeds from underreported taxable sales, they were either obtained by the defendant himself, as to which there is nothing in the record, or retained by the businesses he owned. Forfeiture of both money and businesses under a "proceeds" theory is thus contrary to fact and violates double jeopardy. We agree with the

Government that this ignores the terms and conditions of Judge Sifton's order insofar as it returns to Porcelli any excess moneys remaining after the prescribed payments to the State and the United States.

Porcelli also argues that he could not have been subject to forfeiture under section 1963(a)(1), because that section was not specified as a basis for forfeiture in the bill of particulars. However, paragraph 35 of the indictment referred to this theory of forfeiture, and the only particulars Porcelli sought or the court required specified the properties subject to forfeiture, not the Government's legal theories. While at trial Porcelli did not object to the special interrogatory tracking the language of section 1963(a)(1), he now argues that the language of that special interrogatory did not sufficiently track the exact language of the statute, which covers interests acquired or maintained "in violation of section 1962." The jury was asked to consider whether Porcelli's interests had been "acquired or maintained through his racketeering activity." This language is drawn from section 1962(b); but subsection 1962(c), the basis of this prosecution, also uses the phrase "through a pattern of racketeering activity." It was not error for the charge to overlap in this way with the language of section 1962(b).

Finally, the forfeiture verdict does not constitute unusual punishment. It provides for restitution to the victim--the State of New York--in an appropriate amount. By requiring Porcelli to pay the United States twice the amount owed to New York, the forfeiture verdict amounts to triple damages, something rather commonly known first in antitrust cases and now in civil RICO. We do not think that this is disproportionate within Solem v. Helm, 463 U.S. 277, 77 L. Ed. 2d 637, 103 S. Ct. 3001 (1983), or Huber. We note, too, that the forfeiture verdict simply deprives Porcelli of the fruits of his crime and that, while he could have been sentenced to up to twenty years

in prison, 18 U.S.C. @ 1963(a), his prison term runs only two years.

Porcelli's arguments pertaining to inadequacy of trial counsel under Strickland v. Washington, 466 U.S. at 687-90, are simply unavailing. Porcelli was represented at trial by Jay Goldberg, a well-known, experienced criminal lawyer, with assistance by Professor Steven A. Reiss, a former United States Supreme Court law clerk and a professor of law at New York University School of Law, and Edward M. Chikofsky, a former federal district court law clerk and adjunct professor at Fordham University Law School who was prevailing counsel in a recent significant RICO attorneys' fees forfeiture case, United States v. Monsanto, 852 F.2d 1400 (2d Cir. 1988) (en banc), petition for cert. filed, 57 U.S.L.W. 17 (U.S. Sept. 14, 1988) (No. 88-454). It is plain from the record that a considered decision was made by able counsel to seek to convince the jury that the charged mailings were not sufficiently in furtherance of Porcelli's frauds to sustain the mail fraud charges. The defense also sought to portray this as an overzealous, unfair prosecution more properly brought in state court. They chose not to distinguish between offending corporations and nonoffending corporations and to make arguments based upon proportionality as in McKeithen or to advance some of the other arguments made on appeal relative to forfeiture, for the obvious reason that this would have amounted to a concession that Porcelli's racketeering profits in the gasoline station corporations which did file false returns would have to be forfeited.

Judgment of conviction of all counts except counts 2, 13, 18, 24, 40, and 51 affirmed; judgment of forfeiture reversed [*1367] and remanded for further proceedings consistent with this opinion.

DISSENT: JON O. NEWMAN, Circuit Judge, dissenting:

Oscar Porcelli owes the State of New York nearly $ 5 million in state sales taxes that he failed to collect from his retail gasoline customers. New York is entitled to sue him civilly for those taxes and to collect penalties and interest. N.Y. Tax Law @ 1145 (McKinney 1987). New York can also prosecute him criminally for the misdemeanor of willfully failing to collect sales taxes from a customer. N.Y. Tax Law @ 1145(b) (McKinney 1966). n1 But New York has not pursued either of its state law remedies. Instead, the United States has charged Porcelli under federal mail fraud and racketeering statutes and has obtained a felony conviction that sends him to jail for six months and requires him to forfeit his property in an amount equal to three times the unpaid sales taxes. Before tolerating such an extraordinary disparity between federal and state enforcement techniques, especially as to a matter so central to the prerogatives of states as the collection of their own taxes, courts should be scrupulous in making sure that the conduct punished under federal authority falls within the reach of federal statutes. In my view, the mail fraud statute, as construed by the Supreme Court in McNally v. United States, 483 U.S. 350, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987), does not apply to Porcelli's conduct; moreover, if, as the panel's opinion holds, the statute could apply to Porcelli's conduct on a theory of concealment of a chose in action, his onviction is invalid because this theory was not charged in the indictment nor placed before the jury in the trial judge's charge and therefore, under well-settled law, cannot be the basis for upholding the verdict. I therefore respectfully dissent.

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n1 This version of section 1145(b) was in effect at the time of the events in this case. See 1965 N.Y. Laws, ch. 93, @ 1145(b) (1965) ("any person willfully failing to collect the tax from a customer" is guilty of a misdemeanor). The current

version, similarly worded, is N.Y. Tax Law @ 1817(c) (McKinney 1987).

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I. The Absence of a Deprivation of the State's Property

Prior to McNally, this Circuit and others had held that failure to pay state taxes could establish a scheme to defraud within the meaning of the federal mail and wire fraud statutes. United States v. DeFiore, 720 F.2d 757 (2d Cir. 1983), cert. denied, 467 U.S. 1241, 104 S. Ct. 3511, 82 L. Ed. 2d 820 (1984); United States v. Melvin, 544 F.2d 767 (5th Cir.), cert. denied, 430 U.S. 910, 51 L. Ed. 2d 587, 97 S. Ct. 1184 (1977); United States v. Brewer, 528 F.2d 492 (4th Cir. 1975); United States v. Mirabile, 503 F.2d 1065 (8th Cir. 1974), cert. denied, 420 U.S. 973, 43 L. Ed. 2d 653, 95 S. Ct. 1395 (1975); United States v. Flaxman, 495 F.2d 344 (7th Cir.), cert. denied, 419 U.S. 1031, 42 L. Ed. 2d 306, 95 S. Ct. 512 (1974). McNally requires us to reconsider the continued validity of that line of cases.

McNally contains two holdings. First, the Court held that fraud within the meaning of the federal mail and wire fraud statutes requires a "'deprivation'" of another's money or property. 107 S. Ct. at 2881 (quoting Hammerschmidt v. United States, 265 U.S. 182, 188, 68 L. Ed. 968, 44 S. Ct. 511 (1924)). Second, the Court held that "the intangible right of the citizenry to good government" is not property within the meaning of the federal fraud statutes. 107 S. Ct. at 2879. n2 McNally's second holding, concerning the intangible right to honest government, is not implicated by Porcelli's appeal. But the first holding, requiring a deprivation of another's money or property, squarely applies. The deprivation need not be successful, but it must be the object of the scheme to defraud.

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n2 As the Court was subsequently to make clear, some intangible rights, such as an employer's right to maintain the secrecy of its information, are property within the meaning of federal fraud statutes. Carpenter v. United States, 484 U.S. 19, 108 S. Ct. 316, 98 L. Ed. 2d 275 (1987).

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The panel majority recognizes that after McNally a mail fraud conviction may be upheld only upon proof that the defendant schemed to deprive another of money or property. [*1368] As the majority puts it, and I fully agree, the concept of deprivation means "obtaining property with an intent not to pay as opposed to mere failure to pay." F.2d . I also agree with the majority's further observation that Porcelli would have deprived the State of its property if it had been shown that he had collected sales taxes and had failed to remit them to the state tax collector. n3 But, as the majority acknowledges, there was no evidence that Porcelli collected even $ 1 of sales tax.

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n3 The majority suggests that collection of sales taxes of Porcelli from customers would have been proven if there had been evidence that the sales tax amount was posted on signs at the gas pumps. Obviously, this speculation cannot save the conviction because there was no such evidence. Moreover, it is not all clear that sales taxes are ever reflected on signs at the pump, either in pennies or as a percent of the selling price. The state sales tax is not a gasoline excise tax, the amount of which is sometimes displayed at the pump.

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Moreover, the indictment does not charge him with collecting any sales taxes, nor describe the scheme to defraud as the failure to remit collected taxes. The indictment simply alleges that retail gasoline vendors are "required" to collect sales taxes and that Porcelli's scheme was to defraud the State of "sales taxes due." Though the indictment also alleges a scheme "to obtain monies from the State of New York" (emphasis added), there was no evidence that any money moved from New York to Porcelli, nor did the jury charge require the jury to find that this happened. The indictment charged and the proof established only that Porcelli failed to pay the sales taxes that he owed to New York because he had failed to collect them. See N.Y. Tax Law @ 1137(e)(1) (McKinney 1987).

This distinction between owing uncollected taxes and failing to remit collected taxes is not just a technical matter of pleading and proof; it has significant dollar consequences for Porcelli and New York. New York imposes an 8% sales tax. n4 If the United States (on behalf of New York) had charged Porcelli with collecting but failing to remit the sales tax, and if the evidence had shown that he did collect the tax, the amount of the tax would have been calculated by dividing Porcelli's sales revenue by 1.08 and subtracting the quotient from his sales revenue. n5 Thus, for each dollar of revenue, the tax collected would have been 7.4 cents. In other words, each dollar of revenue would have consisted of 92.6 cents of the sales price of the gasoline plus 7.4 cents (8% of 92.6) of sales tax. However, by charging Porcelli with failing to collect the tax, the Government was able to claim that Porcelli owed New York 8 cents for each dollar of revenue. The Government's use of the 8-cents-per-dollar approach produced a tax debt of $ 4,755,000, whereas the 7.4-cents-per-dollar approach would have produced a debt of $ 4,398,000. Thus, by alleging that Porcelli had never collected the sales tax from his customers,

the prosecution gained an extra $ 357,000 for New York and an extra $ 714,000 for the United States in forfeited property.

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n4 The exact percentage of the tax varies throughout the state since there is both a state and a local sales tax. For Porcelli's sales, the prosecution used an 8 percent rate.

n5 This calculation is not only a matter of arithmetic; it was testified to by the prosecution's tax expert, an official of the New York Tax Department. After testifying that the amount of tax should be "backed out" using the calculation in the text if the tax had been collected, the expert then proceeded to calculate Porcelli's tax debt on the assumption that he had not collected the tax: the expert multiplied the prosecution's sales figures by 8 percent.

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The issue of law for us is whether, after McNally, a person has deprived a state of its money or property by failing to collect taxes and by failing to pay taxes he owes by reason of his failure to collect them. I believe the answer is "no." Unless and until extracted from Porcelli's customers, the dollars of sales taxes that he should have collected belonged to those customers, not the State of New York. Once Porcelli failed to collect the sales taxes, he became liable for the amount he should have collected, but that amount, in his hands, was still his property, not New York's. He owes New York the amount of sales taxes [*1369] he should have collected, but a debtor does not deprive his creditor of the creditor's property simply by failing to pay the debt.

It is arguable that Porcelli has deprived New York of his personal share of all the services New York renders to its taxpayers; it is those services that Porcelli has obtained from

New York by not paying the taxes he owes. But it is highly doubtful that a taxpayer's share of state services is the sort of property that may be the object of a mail fraud scheme after McNally. In any event, the indictment did not charge a scheme to defraud New York of a share of state services, and the case was not submitted to the jury on this theory.

What Porcelli has done is fail to pay a debt due the State of New York. Though the mail fraud statute has been given broad application, it has never been interpreted to cover non-payment of debt and may not be so interpreted after McNally. Though willful evasion of taxes is commonly referred to as "tax fraud," the failure to collect sales taxes and the failure to pay the tax debt resulting from non-collection is not "fraud" in the common-law sense in which McNally uses that term.

II. The Panel's Theory of Deprivation of Choses in Action

Apparently recognizing that Porcelli may not be said to have deprived New York of its money or property simply because he did not collect sales taxes and did not pay his resulting debt to New York, the panel majority constructs a theory of deprivation of property based on the idea that Porcelli has deprived the state of its "choses in action," its right to sue Porcelli for the amount of taxes he owes. I can readily agree that New York has a claim against Porcelli for the sales taxes that he owes and that this claim may be regarded as a chose in action. Even if this chose in action is "property" within the meaning of that term in McNally, it is questionable whether Porcelli has "deprived" New York of such property within the meaning of that term in McNally by concealing from New York the amount of the tax debt that he owes. But there is no occasion on this appeal to decide whether the mail fraud statute could be applied to Porcelli on a theory of depriving New York of its chose in action (as distinguished from its

money) because this theory was not charged in the indictment, nor presented to the jury.

McNally itself is the most recent authority for the well-settled principle that an uncharged theory cannot be used to salvage a criminal conviction. After invalidating the conviction that had been obtained on the theory that McNally had deprived citizens of their right to honest performance of his duties, the Supreme Court refused to uphold the conviction on an alternative theory, pressed at oral argument, that McNally had obtained property (a share of insurance commissions) by means of false pretenses. The Court pointed out that "there was nothing in the jury charge that required such a finding [of receipt of money by false pretenses]." 107 S. Ct. at 2882. So here, there was nothing in the jury charge that required the jurors to find that Porcelli had deprived New York of its property by concealing a chose in action. The principle that a conviction may not be salvaged by a theory of violation not submitted to the jury has been invoked repeatedly. E.g., Chiarella v. United States, 445 U.S. 222, 236-37, 63 L. Ed. 2d 348, 100 S. Ct. 1108 (1980); Rewis v. United States, 401 U.S. 808, 814, 28 L. Ed. 2d 493, 91 S. Ct. 1056 (1971); Dunn v. United States, 442 U.S. 100, 106-07, 60 L. Ed. 2d 743, 99 S. Ct. 2190 (1979).

Conclusion

Porcelli was not charged with collecting sales taxes and thereafter failing to remit to New York tax dollars that belonged to New York. The jury charge described his offense as defrauding New York of "sales taxes due on the retail sale of gasoline." Porcelli owed those taxes under New York law because he had not collected the taxes. He owes New York a debt, but he has not deprived New
York of its money or property. After McNally, his conduct in failing to pay his sales tax debt is not within the scope of the

federal mail fraud statute. The alternative theory that he deprived [*1370] New York of its property by concealing its chose in action was neither charged nor submitted to the jury and may not be used to uphold the conviction. We should not strain to uphold a federal conviction for non-payment of state taxes, a matter best left, in the absence of clear federal law coverage, to the abundant civil and criminal authority of the states. For these reasons, I respectfully dissent.

Plaintiff's final claim of a continuing collateral consequence is that he is barred from jury service, presumably by operation of *28 U.S.C. § 1865*(b)(5). As the Supreme Court has stated, "all qualified citizens have a civic right, of course, to serve as jurors ...." *Powers v. Ohio, 499 U.S. 400, 424, 113 L. Ed. 2d 411, 111 S. Ct. 1364 (1991);* see also *Bershatsky v. Levin, 920 F. Supp. 38, 39 (E.D.N.Y. 1996)* (stating that "jury service is a duty and a right of citizenship"); *United States v. Madonia, 1990 U.S. Dist. LEXIS 20851, No. CR-78-143, 1990 WL 68887,* at *2 (E.D.N.Y. May 16, 1990) (noting that among the legal disabilities which attach upon conviction are "the loss of the right ... to serve as a juror"). As a result of the criminal conviction that Porcelli challenges here, Porcelli[*12] has lost this right, an undeniable continuing consequence of his conviction. It remains unclear, however, whether such a continuing consequence is sufficient to allow this Court to consider petitioner's coram nobis claims.

The Court of Appeals for this Circuit has found sufficient to warrant coram nobis review a prior conviction that deprived a petitioner of his right to vote, see *Kyle, 288 F.2d at 441* (per curiam), or served as an "aggravating factor" in sentencing for a subsequent offense, see *Nicks v. United States, 955 F.2d at 167.* In *Carafas v. La Vallee, 391 U.S. 234, 237, 20 L. Ed. 2d 554, 88 S. Ct. 1556-38 (1968),* the Supreme Court held in a habeas case that the collateral consequences of the petitioner's conviction, "his inability to vote, engage in certain businesses, hold public office, or serve as a juror," prevented the case from being moot.

In this case, perhaps because of the casual way in which the right to serve on a jury was invoked at oral argument, it is not at all clear that petitioner has such a right. There is no evidence that he has ever been randomly selected for jury service in this or any other district or completed or returned a juror [*13]qualification form, claiming no exemptions sought

despite his conviction to have his civil rights restored or otherwise been deemed unqualified by reason of his conviction pursuant to *28 U.S.C. 1865* et seq. In the absence of such a record, the alleged deprivation of petitioner's right to serve on a jury seems at least as speculative as his right to obtain a liquor license and is an inadequate basis on which to authorize coram nobis review. n1

n1 It is noteworthy that, if the operation of *28 U.S.C. § 1865* were a sufficient continuing collateral consequence to merit coram nobis review, few felony convictions would ever be final.